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No.

IN THE

Supreme Court Of The United States

October Term 1989

MORTON M. LAPIDES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean, Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007
(202) 342-5200

Of Counsel

Alan Dershowitz, Esquire
and
Elizabeth A. Boggs, Esquire
Of Counsel
232 Brattle Street
Cambridge, MA
(617) 495-3100

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Balmar Legal Publishing Division, Washington, DC 20005 (202) 659-3610

QUESTIONS PRESENTED

I. Whether the disposition of a criminal appeal by means of an unpublished *per curiam* opinion which does not address substantial issues raised by appellant is appropriate.

II. Whether directly contradictory testimony within the government's case on the pivotal factual issue of culpability constitutes substantial evidence to support conviction beyond a reasonable doubt.

III. Whether the trial court's repeated comments bolstering the credibility of the sole witness against petitioner denied petitioner a fair trial.

IV. Whether the admission of evidence in support of a theory of vicarious criminal liability not stated in the indictment, and the argument of that theory to the jury, constitutes an impermissible constructive amendment of the indictment.

V. Whether *Brady v. Maryland*, 373 U.S. 83 (1963), requires the prosecution to disclose critical changes in the testimony of prosecution witnesses before trial.

NOTE: Parties to the proceeding below in the Court of Appeals for the Fourth Circuit (not listed in the caption of this petition) are: Washington Legal Foundation (Amicus Curiae); James J. Harford; Allegheny Bottling Company; and Pepsico, Inc. This petition pertains only to Morton M. Lapides, Docket No. 88-5140 in the case below. See Appendix A.

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REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

The unpublished per curiam opinion of the Court of Appeals, issued January 11, 1989, and the denial of petition for rehearing and suggestion for rehearing *en banc* issued on April 7, 1989, appear in the Appendix hereto. The unpublished opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, rendered on September 19, 1988, also appears in the Appendix hereto.

SUPREME COURT JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 11, 1989. A timely petition for rehearing *en banc* was denied on April 7, 1989, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER RELEVANT PROVISIONS

U.S. Const. Amend. V.

15 U.S.C. § 1 (1973)

28 U.S.C. § 1254(1) (1966)

28 U.S.C. § 1291 (1966)

Fed. R. Crim. P. 29

4th Cir. I.O.P. 27.5

4th Cir. I.O.P. 36.4

[COMPLETE TEXT IN APPENDIX]

No.

IN THE

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October Term 1989

MORTON M. LAPIDES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Morton M. Lapides, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 11, 1989, and upon which the Fourth Circuit denied Petitioner's application for rehearing and suggestion for rehearing *en banc* on April 7, 1989.

STATEMENT OF THE CASE

Petitioner Morton M. Lapides was charged in a one count indictment with conspiring to fix prices, in violation of 15 U.S.C. § 1. At trial, the prosecution sought to show that Petitioner had initiated the conspiracy at a meeting in the Spring of 1982 by instructing a subordinate, Jerry Pollino, to meet with a competitor to fix prices. The Spring 1982 meeting was allegedly attended by Lapides, James Sheridan, and Pollino. Both Sheridan and Pollino testified on behalf of the prosecution, but only Sheridan supported the prosecution's claim that Lapides had instructed Pollino to fix prices. In fact, Pollino denied he had been so instructed by Lapides, and could not say that Lapides agreed to Pollino's meet-

ing with a competitor or that Lapides was even aware that the proposed meeting would include a discussion of prices. (A. at 2528, 2532.)[1] Thus, Sheridan was the only witness to testify that Lapides initiated or participated in the conspiracy.[2]

During the cross-examination of Sheridan, and again during jury instructions on the credibility of witnesses, the trial court instructed the jury that Sheridan was "not on trial." (A. at 1541, 1552, 7936.) This comment, coming in the middle of instructions and immediately following closing arguments focusing on Sheridan's credibility, amounted to a personal endorsement of Sheridan's credibility by the trial court.

The government also presented evidence at trial tending to show that Petitioner, as chairman of the board of Allegheny Beverage Company, exercised or sought to exercise control over the legitimate business affairs of the company. The government presented this evidence in an effort to show that, solely because of Petitioner's position in the company, Petitioner knew or should have known of the conspiracy and failed to stop it. Although the trial court declined to give an instruction stating that the failure of a corporate executive to discover and put a stop to price fixing activities was itself a basis for conviction, the government nonetheless argued this theory to the jury. (A. at 7556, 7557.)

On May 19, 1988, Petitioner was convicted in the United States District Court for the Eastern District of Virginia in Norfolk, Virginia, of one count of conspiracy to fix prices in violation of the Sherman Act. Petitioner was sentenced to 179 days imprisonment, three years of community service (two years at 35 hours per week and one year at 35 hours per month), and fined $100,000.00. Petitioner filed a timely appeal.

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[1]References to the Appendix filed in the Fourth Circuit are denoted by the abbreviation "A."

[2]Sheridan and Pollino also disagreed on numerous details of the meeting: Sheridan testified that Petitioner called the meeting and that the meeting lasted 45 minutes. Pollino testified that Sheridan called the meeting and that the meeting was a stand-up meeting lasting at most a minute and a half. (A. at 1647, 2528.) Sheridan's testimony that Petitioner initiated the conspiracy in 1982 also contradicted his earlier testimony that the conspiracy began in 1983. *See infra* at 17-19.

On appeal, Petitioner contended, *inter alia*, that (1) the trial court's endorsement of Sheridan's credibility had denied him a fair trial by an impartial jury; (2) the conflicting testimony of Sheridan and Pollino regarding the crucial Spring 1982 meeting could not constitute sufficient evidence to support the verdict; (3) the government's use of an uncharged theory of vicarious liability at trial constituted an impermissible constructive amendment to the one count indictment; and (4) the government had violated its obligation under *Brady v. Maryland* to disclose exculpatory evidence to defendants.

On January 11, 1989, the Court of Appeals for the Fourth Circuit issued an unpublished *per curiam* opinion affirming appellant's conviction. The opinion did not address the issues raised by Petitioner, despite the fact that Petitioner extensively briefed and argued his contentions, and set forth specific citations to the relevant portions of the record and substantial discussion of relevant precedent. In particular, the Court never even mentioned the *Brady v. Maryland* issue or the prejudicial effect of the trial court's comments regarding the credibility of the only witness inculpating Petitioner.[3] Instead, the Court merely stated that "there was sufficient evidence to sustain the conviction...." Opinion at 7. However, even this conclusion appears to be based on a misunderstanding of a critical portion of the record.

In affirming Petitioner's conviction, the Court of Appeals obviously believed that the testimony of prosecution witness Jerry Pollino supported the prosecution's claim that Petitioner initiated and authorized the conspiracy:

> The conspiracy was proved by the testimony of officers and employees of both AP [Allegheny Pepsi] and MAC [Mid-Atlantic Coke]. One of the most important witnesses was Jerry Pollino, the vice president of AP... In the spring of 1982, Morton M. Lapides called AP presi-

[3]The failure of the Opinion to address issues raised by appellant or to adequately explain the Court's decision violates even the Fourth Circuit's own Internal Operating Procedures ("I.O.P."). I.O.P. 36.4 provides that unpublished opinions should give "counsel, the parties and the lower court or agency a statement of the reasons for the decision." The Opinion clearly failed to meet this standard.

> dent, James Sheridan, and Jerry Pollino to a meeting and stated his concern that MAC was deviating from the prices listed on its promotional letters and was offering bigger discounts to some customers. He suggested that since Pollino and Harford had previously worked together, that Pollino arrange a meeting with Harford...and discuss with him the adhering by both companies to the prices stated in their promotional letters.

Opinion at 5-6. (Appendix at 5a.) However, the above quoted passage describes Sheridan's testimony – not Pollino's. In fact, Pollino contradicted Sheridan on the 1982 meeting. Later, the Court of Appeals incorrectly states:

> Both Sheridan and Pollino testified that Lapides conceived the idea of a price fixing arrangement with MAC and he suggested the time and the place of the first meeting between Pollino and Harford.

Opinion at 7. (Appendix at 6a.) This characterization of the trial record is simply wrong.

The Court's characterization of the evidence reflects a fundamental misunderstanding of the record. Pollino did not support the government's allegations regarding the Spring 1982 meeting. Moreover, Pollino did not testify that Petitioner conceived the idea of a price fixing arrangement with Mid-Atlantic Coke or suggested the time and place of the first meeting between Pollino and Harford. To the contrary, Pollino contradicted Sheridan on crucial points regarding the Spring 1982 meeting. Pollino denied that (1) Petitioner instructed him to meet with a competitor; (2) Petitioner assented to price fixing activities; and (3) the purpose of Pollino's proposed meeting with a competitor was mentioned to Petitioner. Indeed, Pollino testified that it was Sheridan, and not Petitioner, who conceived the idea of fixing prices with Mid-Atlantic Coke at a prior meeting not attended by Petitioner. (A. at 3253.)

REASONS FOR GRANTING THE WRIT

I. THE DISPOSITION OF CRIMINAL APPEALS BY MEANS OF UNPUBLISHED AND SUMMARY OPINIONS IS A SUBSTANTIAL AND RECURRING PROBLEM DESERVING THIS COURT'S SCRUTINY.

The Fourth Circuit's decision to dispose of this appeal through an unpublished opinion clearly indicated the Court's belief that Petitioner's appeal was not worthy of the Court's full and reasoned consideration.[4] The opinion gave only cursory attention to Petitioner's contentions, totally ignored issues extensively briefed by Petitioner, and ultimately grounded its affirmance of Petitioner's conviction on a misreading of the record.

A criminal defendant has a right to appeal his conviction to the Court of Appeals. *See* 28 U.S.C. §1291; *Abney v. United States*, 431 U.S. 651 (1977). Moreover, a criminal defendant must be accorded due process in connection with the exercise of his right of appeal. *See Douglas v. People of California*, 372 U.S. 353 (1963). However, if the right of appeal created by 28 U.S.C. §1291 is to be meaningful, it is difficult to reconcile the "right" of appeal with an opinion rendered by a court of appeals that ignores the very issues on which an appellant based his appeal. The use of unpublished and summary opinions, particularly in disposing of criminal appeals, raises serious problems in the administration of justice, and invites troubling abuses which, in circumstances such as this, effectively vitiate a criminal defendant's right of appeal. If the right of appeal is to be meaningful, there must be some assurance that

[4] Although the Fourth Circuit's decision was not technically a summary disposition of the appeal, the Court's failure to address in its opinion the substantial constitutional issues raised by Petitioner was in effect a summary affirmance. The Court's summary treatment of this appeal is all the more surprising because the Court's own internal operating procedures discourage requests for summary dispositions. In setting forth the standard that counsel should use in considering a motion for summary disposition, the Court advises that "Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are *manifestly unsubstantial* [emphasis added] and appropriate for disposition by motion." *4th Cir. I.O.P.* 27.5.

substantial and constitutional claims on appeal will receive full consideration.

The power of the courts of appeals to dispose of appeals through summary opinions must be circumscribed to prevent the evisceration of the right of appeal intended by Congress. In *Taylor v. McKeithen*, 407 U.S. 191 (1972), this Court implicitly recognized that circumstances exist in which a summary disposition of an appeal is inappropriate, and a full discussion of the reasons for the court's decision is required. In *Taylor*, the Court reviewed the summary reversal of a redistricting plan by the Court of Appeals. The Court, lacking a discussion by the Court of Appeals of its reasoning, hypothesized at least two possible reasons for the reversal, one of which would present an important federal question. *Id.* at 193-194. Accordingly, the Court vacated the summary reversal, and remanded for a complete explanation of the lower court's actions. *Id.* While the Court also recognized that courts of appeals should have wide latitude in whether or how to write opinions, especially in summary affirmances, wide latitude is not unlimited license. The Court in *Taylor* recognized that circumstances exist when the reasoning of the Court of Appeals must be fully developed in order to guide the law.

Several circuits have addressed the issue of whether the summary affirmance of a criminal conviction necessarily violates due process. While finding that due process does not prohibit summary affirmance, the Second and Third Circuits recognized the obligation of courts of appeals to obey their own internal rules regarding such dispositions and to provide at least some consideration of a Petitioner's claims.

In *United States v. Baynes*, 548 F.2d 481 (3d Cir. 1977), for example, the Third Circuit initially affirmed Petitioner's conviction by judgment order. *Id.* at 482. Petitioner's request for rehearing asserted that "affirmance by judgment order without an opinion constituted a denial of due process of law." *Id.* The Court noted that its decision by judgment order was in accord with its internal rules and operating procedures, relying on *Taylor*. *Baynes*, 548 F.2d at 483. While the Third Circuit concluded that no due process violation occurred in the summary affirmance, it is notable that the

court recognized its obligation to at least obey its own rules for such dispositions.

Similarly, in *Furman v. United States*, 720 F.2d 263 (2d Cir. 1983), the Second Circuit found no due process violation in a summary affirmance of a criminal conviction. Again, however, the Second Circuit looked to its internal rules and stated that "[t]he fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Id.* at 265. However, the court explicitly recognized its obligation to provide "a statement as to the rationale for the ruling on the appeal." and continued:

> Such statements range from a one-sentence adoption of the ruling of the district court to a several-page, item-by-item listing of the appellant's contentions and the panel's reasons for their rejection. In Furman's case, for example, the order of summary affirmance was five pages long and discussed eleven of Furman's contentions.

Furman, 720 F.2d at 265-266.

In this case, the Fourth Circuit did not follow its own internal operating procedures. Internal Operating Procedure 36.4 requires that an unpublished opinion give "counsel, the parties and the lower court or agency a statement of the reasons for the decision." The Fourth Circuit's opinion below not only failed to give Petitioner the Court's reasons for rejecting his contentions, it failed to even address them.

The growing practice of disposing of appeals through unpublished opinions has been strongly criticized by commentators and members of the bench for some of the very reasons exhibited in this case.[5] For example, Justice Stevens has criticized the use of

[5] *See e.g., County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (Stevens, J. dissenting); Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No Citation Rules in the United States Court of Appeals*, 78 Colum.L.Rev. 1167, 1204 (1978); Wald, *The Problem with the Courts: Black-robed Bureaucracy or Collegiality Under Challenge?*, 42 Md.L.Rev. 766, 783 (1983); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Court of Appeals: The Price of Reform*, 48 U.Chi.L.Rev. 573 (1981).

unpublished opinions, noting that the "decision not to publish the opinion or permit it to be cited — like the decision to promulgate a rule spawning a body of secret law — was plainly wrong." *County of Los Angeles v. Kling*, 474 U.S. 936, 937 (1985) (Stevens, J. dissenting) (footnote omitted).

The "secret law" created by unpublished opinions not only fails to contribute to legal precedent and the advancement of the common law, it also allows Courts of Appeals to engage in decision-making without the discipline and accountability that the preparation of a published opinion requires:

> In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one of its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus, the opinion serves as a steadying factor which aids reckonability.

Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and No-Citation Rules in the United States Court of Appeals*, 78 Colum.L.Rev. 1167, 1204 (1978), *quoting* K. Llewellyn, *The Common Law Tradition*, 26 (1960). In addition, the use of unpublished opinions undercuts the very foundation of the judicial system, which rests on the premise that justice is a public, not a secret, process.

Judge Wald has noted that the use of unpublished opinions increases the likelihood of both inconsistent treatment of litigants and public doubts about the fairness and integrity of the legal system:

> It is argued that the option to decide which of those opinions will not be published permits judges too much discretion to decide which opinions will become the law of the circuit. The practice masks and therefore increases the likelihood of nonuniform dispositions, im-

> pedes informed client counseling, and may leave counsel groping in darkness...
>
> The practice has an obvious bearing on judicial accountability. Although unpublished opinions may indeed save time, they limit the public's ability to evaluate the correctness of judicial actions and give rise to uncertainties about the integrity of the courts.

Wald, *The Problem with the Courts: Black-robed Bureaucracy, or Collegiality Under Challenge?*, 42 Md.L.Rev. 766, 783 (1983).

Commentators have also criticized the use of unpublished opinions as a practice which will inevitably result in diminished quality of opinions, denial of equal treatment by the courts for certain classes of litigants, and ultimately, the vitiation of the right of appeal. *See* Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U.Chi.L.Rev. 573 (1981).

The commentators discussed herein recognize that the increasing use of unpublished and summary opinions work to keep the law from performing one of its vital functions — providing guidance for similar situations that will arise in the future. Petitioner submits that, with each circuit employing its own often unwritten rules and standards for the disposition of appeals through summary disposition or unpublished opinions, conflicts between the circuits must inevitably arise and just as inevitably remain hidden. The result must necessarily be inconsistent and contradictory applications of federal law and a failure of justice. Without guidance from this Court regarding a consistent standard, these hidden conflicts will never see the light of day.

In this case, Petitioner sought to exercise his right of appeal to have the Fourth Circuit review his conviction on the grounds described above. It is difficult to understand, however, how Petitioner's right of appeal can be considered meaningful when the reviewing court not only ignored the grounds on which Petitioner sought to have his conviction reviewed, but affirmed that conviction on grounds not supported by the trial record. The Fourth Circuit's decision to dispose of Petitioner's appeal with an brief unpublished opinion based on an erroneous reading of the

record, both in and of itself, and as a symptom of the problems inherent in such opinions, deserves the scrutiny and guidance of this Court. Petitioner asks this Court to exercise its supervisory powers over the federal courts and set uniform standards for publication of opinions and summary disposition of criminal appeals.

II. THE PROSECUTION'S PRESENTATION OF DIRECTLY CONTRADICTORY TESTIMONY ON THE PIVOTAL FACTUAL ISSUE OF CULPABILITY RAISES AN IMPORTANT QUESTION RELATING TO THE STANDARD OF REVIEW ON A MOTION FOR JUDGMENT OF ACQUITTAL.

Rule 29 of the Federal Rules of Criminal Procedure provides that a trial court may set aside a verdict and enter a judgment of acquittal if the evidence at trial is insufficient to sustain a conviction. Fed.R.Crim.P. 29. The test in assessing the sufficiency of evidence on a motion for judgment of acquittal applied by the trial court below was whether, taking the view most favorable to the government and without evaluating credibility, there is substantial evidence from which the jury might find the defendant guilty beyond a reasonable doubt. *See United States v. Arrington*, 719 F.2d 701, 704 (4th Cir. 1983), *on appeal after remand*, 757 F.2d 1484 (4th Cir. 1985).

In denying Petitioner's motion for judgment of acquittal, the trial court ignored the flatly contradictory testimony of the government's two principal witnesses — Sheridan and Pollino — regarding whether Lapides initiated the conspiracy to fix prices. In doing so, the trial court clearly chose to believe Sheridan's testimony and to disbelieve Pollino's testimony, thus implicitly weighing the credibility of the government's two chief witnesses. The contradictions between Pollino and Sheridan's testimony regarding the Spring 1982 meeting were absolutely critical because the entire case against Lapides rested on the government's assertion that Lapides initiated the price fixing activities during the Spring 1982 meeting. Sheridan testified that Lapides had initiated the conspiracy during the Spring 1982 meeting by instructing

Pollino to fix prices. Pollino denied that Lapides had so instructed him.

The trial court's application of the standard of review on a motion for judgment of acquittal goes to the very heart of the presumption of innocence and the reasonable doubt standard. If the verdict in this case rested solely on the testimony of a single prosecution witness who first testified that Petitioner initiated the conspiracy, and then later contradicted that testimony, the trial court would be compelled to reverse the conviction. *See United States v. Dumas*, 688 F.2d 84 (10th Cir. 1982).

In *Dumas*, the court reversed a conspiracy conviction because the only prosecution witness on an essential element of the conspiracy charge contradicted himself. *Id.* at 87. The prosecution witness first testified that the defendant intended to obtain prescription drugs through unlawful acts, but later denied it. *Id.* The court concluded that this contradiction within the prosecution's case made the evidence "as consistent with innocence as it is with guilt." *Id.* at 88 (citation omitted). The court ruled that there was not substantial evidence to support the verdict beyond a reasonable doubt. *See also United States v. Varoz*, 740 F.2d 772 (10th Cir. 1984) (granting judgment of acquittal).

The rule regarding flatly contradictory testimony in the prosecution's own case should not depend on whether the contradictory evidence comes from one or more than one of the prosecution's witnesses. In either event, the government has sponsored two different versions of the facts, one consistent with innocence and the other supporting guilt. Moreover, when the prosecution presents directly contradictory testimony on a key issue of guilt, there is a heightened risk that the jury is being asked to convict on perjured testimony.

A rule which encourages prosecutors to "run up the flagpole" inconsistent, conflicting, and even contradictory testimony on critical factual issues in the hopes that the jury will salute one of the versions is not in the interests of justice. Since the case against Petitioner rests entirely on whether Petitioner initiated the conspiracy during the Spring 1982 meeting — the very issue upon which Sheridan and Pollino contradicted each other — there was

not sufficient evidence to support the verdict beyond a reasonable doubt.[6]

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE TRIAL COURT'S REPEATED COMMENTS BOLSTERING THE CREDIBILITY OF THE SOLE WITNESS AGAINST PETITIONER DENIED PETITIONER A FAIR TRIAL.

At the conclusion of trial, immediately following the reading of an instruction regarding the credibility of immunized witnesses and co-conspirators, the trial court gave its own comments about the prosecution's only witness against Petitioner, James Sheridan:

> I emphasize that certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case.

(A. at 7936.) This comment was particularly damaging to Petitioner because (1) it came immediately following closing arguments, in which Sheridan's credibility was identified as the central issue in the case against Petitioner, and (2) it reemphasized similar comments by the trial judge during Sheridan's cross-examination. (A. at 1541, 1552.) The trial court's comment not only gave the jury a clear impression that, in the court's view, Sheridan's credibility was not in issue, but also amounted to a personal endorsement of Sheridan's credibility.[7]

[6]The prosecution contended below that Petitioner could be convicted for joining an ongoing conspiracy even if he did not in fact initiate the conspiracy, as the government contended at trial. There was, however, no evidence at trial that Petitioner joined an ongoing conspiracy. Indeed, Sheridan, the only witness who testified that Petitioner had actual knowledge of the conspiracy, testified that his alleged discussions with Petitioner regarding the conspiracy were pursuant to an ongoing directive allegedly made by Petitioner during the 1982 meeting. Consequently, if the direct contradictions between the testimony of Sheridan and Pollino regarding the 1982 meeting necessarily raise a reasonable doubt about whether Petitioner initiated the conspiracy, testimony regarding reports made pursuant to the 1982 meeting must similarly be suspect.

[7]During the course of the trial, the trial court had exhibited an extremely protective attitude towards Sheridan. For example, the trial court repeatedly interceded on behalf of Sheridan to advise Sheridan how to testify, often sounding more like Sheridan's private attorney at a deposition than the presiding judge at a jury trial:

In *Quercia v. United States*, 289 U.S. 466 (1933), this Court cautioned that the persuasive effect on a jury of a trial court's comments requires safeguards against abuse:

> [The trial judge's] privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling."

289 U.S. at 470.

A trial court's argumentative comments on the credibility of a key witness improperly intrude on the jury's role as factfinder and deprive a defendant of a fair and impartial consideration of his case. The likelihood of prejudice is particularly high where, as here, conviction depends heavily on the testimony of a single government witness. *See United States v. Dunmore*, 446 F.2d 1214, 1218-19 (8th Cir. 1971), *cert. denied*, 404 U.S. 1041 (1972).

Given the importance of Sheridan's credibility to the case against Petitioner, the trial court's comments about him at the conclusion of the case were clearly prejudicial, warranting a new

> THE COURT: All you have to say, Mr. Sheridan, is that I don't remember, or I don't recall that item, and that will end that. You don't —there is no requirement that you answer every question. Just answer those you know, and those you don't know you can say that, and let's just move along.

(A. at 1252.) On other occassions, the trial court undertook to answer questions directed by defense counsel to Sheridan. (*See* A. at 1159, 1293, 1343, 1423, 1432, and 1726.) The prejudice flowing from the trial court's obvious protective attitude towards the prosecution's chief witness was exacerbated by the trial court's comment to the jury during instructions that the judge had formed his opinion about the case:

> Certainly I have an opinion. But it is not my opinion at all. And if you have got any idea what my opinion is, just dismiss it from your mind.

(A. at 7926.)

Moreover, when defense counsel objected to the judge's comment following the reading of the instructions, the trial court declined to give a curative instruction and, upon recalling the jury, readopted "all of the instructions concerning credibility of witnesses." (A. at 7993.)

trial. If the trial court's comment creates "the assumption of the credibility of government witnesses," that comment "dilutes the presumption of innocence." *United States v. Safley*, 408 F.2d 603, 605 (4th Cir.), *cert. denied*, 395 U.S. 983 (1969). Moreover, the trial court's comment endorsing the credibility of an alleged co-conspirator such as Sheridan contradicts the rule "that the accomplice's testimony should be received with care and caution." *Id.*

Petitioner submits that the trial court's endorsement of Sheridan's credibility denied him a fair trial by an impartial jury. Petitioner urges this Court to grant certiorari to address the trial court's argumentative comments.

IV. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE ADMISSION OF EVIDENCE IN SUPPORT OF A THEORY OF VICARIOUS CRIMINAL LIABILITY NOT STATED IN THE INDICTMENT, AND THE ARGUMENT OF THAT THEORY TO THE JURY, CONSTITUTED AN IMPERMISSIBLE CONSTRUCTIVE AMENDMENT TO THE INDICTMENT.

On the eve of trial, the prosecution advanced a new theory of criminal liability for corporate executives, asserting that an executive's knowledge of a price fixing conspiracy and failure to stop it would by itself support a criminal conviction under the Sherman Act. (A. at 187, 8809.) This theory of liability was not alleged in the indictment in this case, which charged Petitioner *only* with active participation in a conspiracy by participating in meetings to agree on prices and by instructing subordinates to act in furtherance of the conspiracy. Petitioner's motion *in limine* to preclude the introduction of evidence in furtherance of this alternative theory of liability was denied by the trial court. (A. at 8838.)

During trial, the prosecution focused on Petitioner's business memoranda, a poster depicting Petitioner suggesting his employees "Do It My Way," and testimony relating to Petitioner's level of involvement in the day-to-day management of his company. None of this evidence relating to Petitioner's management

style was even remotely related to price fixing activities or contacts with competitors. Instead, this evidence was intended to support the government's alternative theory of vicarious criminal liability.

At the conclusion of the trial, the prosecution's request for a jury instruction in support of its vicarious liability theory was denied by the trial court. Nonetheless, the prosecution argued to the jury that Petitioner could be convicted if he knew that price fixing activities were going on and failed to put a stop to them.

The prosecution's use of a vicarious liability theory was especially prejudicial to Petitioner in light of the fundamental conflicts in the prosecution's case against Petitioner. Indeed, the very point of the prosecution's focus on Petitioner's management style was to assure the jury that they could convict Petitioner even if they had doubts about the testimony of the sole witness against him — Sheridan.

A criminal defendant has a constitutional right under the Fifth Amendment "to be tried only on the charges presented in a grand jury." *United States v. Miller*, 471 U.S. 130 (1985). Indeed, "the right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment." *Stirone v. United States*, 361 U.S. 212, 218-19 (1960).

In *Stirone*, the indictment charged that defendant had violated the Hobbs Act by interfering with the interstate shipment of sand. The proof at trial and jury instructions permitted conviction on an alternative theory not charged in the indictment — that defendant had violated the Hobbs Act by interfering with shipments of steel. This court vacated the conviction on the grounds that the proof of the uncharged alternative theory of the crime amounted to an unconstitutional amendment of the indictment noting that "it cannot be said with certainty that with a new basis for conviction added, the [defendant] was convicted solely on the charge made in the indictment the grand jury returned." *Id.* at 217. *See also United States v. Salinas*, 601 F.2d 1279 (5th Cir. 1979), *opinion amended by* 610 F.2d 250 (1980) (reversed conviction because instructions included an alternative theory not charged in the indictment).

In *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981), *cert. denied*, 467 U.S. 1252 (1984), the indictment also alleged a violation of the Hobbs Act, one element of which was the use of extortion. The indictment charged one means of committing extortion — threats of economic loss. At trial, however, the prosecutor presented evidence and made arguments in support of a second means of committing extortion — threats of physical violence. The court reversed the conviction because the prosecution's arguments and evidence gave rise to the possibility that the defendant had been convicted on a charge never returned by the grand jury. *Id.* at 719.

The prosecution's reliance on its vicarious liability theory violated Petitioner's constitutional right to be tried only on a charge approved by a grand jury. The admission of evidence on, and the government's argument of, this theory of vicarious criminal liability permitted the jury to convict on a ground never alleged in the indictment. The indictment in this case charged only one theory of the offense — active participation in a criminal price fixing conspiracy. The indictment did not allege that Petitioner violated the Sherman Act because he had actual or constructive knowledge of price fixing activities and failed to put a stop to them. Indeed, it is not at all clear that a grand jury would agree to indict an executive merely because he should have discovered and put a stop to a price fixing conspiracy and failed to do so.

The trial court's decision to admit evidence in support of the vicarious liability theory, and the prosecution's determination to argue this theory to the jury, obscured the basis for Petitioner's conviction. On appeal, the Fourth Circuit summarily dismissed Petitioner's contentions regarding the government's vicarious liability theory, apparently because the court believed, based upon an erroneous reading of the record, that there was sufficient evidence to support the charge set forth in the indictment. The Fourth Circuit apparently misapprehended the import of the government's use of an alternative theory. A conviction under such circumstances is not sound merely because a jury *could* have convicted on a proper charge. A criminal defendant has a constitutional right to know that his conviction is in fact based upon a charge properly approved by a grand jury.

The prosecution's attempt to bolster a shaky one-witness case by focusing on an alternative theory of liability not set forth in the indictment undermines the grand jury process and effectively denies a criminal defendant his Fifth Amendment rights to be tried only on a charge approved by a grand jury. As the Court stated in *Stirone*:

> The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge.

361 U.S. at 218.

This Court should grant certiorari to address and condemn the use of uncharged alternative theories to bolster a weak or questionable case against a criminal defendant.

V. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER *BRADY V. MARYLAND*, 373 U.S. 83 (1963), REQUIRES THE PROSECUTION TO DISCLOSE CRITICAL CHANGES IN THE TESTIMONY OF PROSECUTION WITNESSES BEFORE TRIAL.

Before trial, Petitioner made both general and specific requests pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Those requests sought, *inter alia*, materials tending to reflect a lack of credibility of expected prosecution witnesses, and, in particular, inconsistencies known to the prosecution in statements made by its two principal witnesses — Sheridan and Pollino. (A. at 57-65.) Although the prosecution purported to comply with its *Brady* obligations several months before trial, critical exculpatory information was never disclosed until trial, and additional exculpatory information was discovered only during defendant's cross-examination of a key prosecution witness. Moreover, concealment

of certain *Brady* material caused the *Brady* disclosures actually made by the prosecution to be misleading.

The exculpatory information at issue concerns significant changes in the testimony of the prosecution's two key witnesses to backdate the beginning of the conspiracy. The backdating of the origins of the conspiracy was of critical importance to Petitioner because Pollino's and Sheridan's prior testimony was absolutely inconsistent with the charge ultimately leveled against Petitioner — initiation of the conspiracy.

The theory of the indictment, and the theory upon which the prosecution tried its case against Petitioner, was that the price fixing conspiracy began during a meeting between Pollino and James Harford, president of Mid-Atlantic Coke, in Ocean City in the Spring of 1982.[8] Both Sheridan and Pollino supported this theory at trial. However, in prior statements and testimony, both Sheridan and Pollino had told a very different story of how the conspiracy began.

Pollino had previously testified three times about his role in the conspiracy under a grant of immunity. In addition, throughout 1986 and 1987, Pollino had made numerous statements to the prosecutors regarding the conspiracy. During this entire time, Pollino testified that the conspiracy began in February 1983, and never mentioned a meeting in Ocean City with Harford. Pollino did, however, implicate Sheridan.

Upon learning that he had been implicated by Pollino, Sheridan entered into a plea agreement with the prosecution and pleaded guilty to participation in a price fixing conspiracy beginning in 1983. Sheridan then testified before the grand jury that the price fixing conspiracy began at a June 1983 Ocean City meeting between Pollino and Harford.

The government confronted Pollino with Sheridan's testimony about the June 1983 Ocean City meeting and succeeded in getting Pollino to corroborate Sheridan's story about the 1983

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[8]Sheridan, but not Pollino, testified that Petitioner had instigated this meeting at a meeting with Sheridan and Pollino shortly before the Ocean City meeting.

Ocean City meeting.[9] Thus, shortly before the indictment in this case was issued, the prosecution was preparing indictments based upon a conspiracy beginning in 1983.[10]

Two weeks before the indictment against Petitioner issued, Harford's counsel produced to the prosecution documents that established that Harford was not in Ocean City in 1983 and thus could not have met with Pollino at that time. The prosecution thereupon apparently got Pollino, but not Sheridan, to backdate the Ocean City meeting to 1982.

The indictment charged Petitioner with initiating a conspiracy beginning in 1982. Thus, at the time the indictment against Petitioner issued, alleging a 1982 conspiracy, the prosecution's chief witness, Sheridan, maintained that the first conspiratorial meeting had occurred in 1983. Sheridan eventually backdated the Ocean City meeting to 1982 several months after the indictment and approximately six weeks before trial.

The backdating of the Ocean City meeting one entire year was a significant change in testimony for Pollino and Sheridan and a startling change in the government's theory of the case.[11] At the time of indictment, the government had obtained a number of prior convictions and voluminous immunized grand jury testimony about a conspiracy beginning in 1983. Moreover, the personal circumstances of Sheridan and Pollino during 1982 and 1983 were very different. In 1982, for example, Sheridan had just been named president of Allegheny Pepsi and was still living in Williamsburg, Virginia; Pollino had just recently rejoined the company. By 1983, Sheridan had been president for more than a year and had relocated to the Baltimore, Maryland area. (A. at 862, 1211.)

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[9]Pollino testified that when the prosecutors confronted him concerning Sheridan's story about the 1983 Ocean City meeting, he was concerned he would lose his immunity. (A. 2980-82.)

[10]A conspiracy beginning in 1983 was consistent with prior indictments, convictions, and plea agreements arising from the prosecution's investigation.

11 The backdating of the meeting to 1982 placed the first conspiratorial meeting between Allegheny Pepsi and Mid-Atlantic Coke in the middle of the appeal of a predatory pricing action between those same two companies.

These dramatic changes in testimony, and the circumstances under which they were made, were obviously information going to the credibility of the prosecution's two principal witnesses (and the only witness against Petitioner). Notwithstanding the importance of the backdating of the Ocean City meeting to the prosecution's case against Petitioner, the prosecution concealed from Petitioner (1) Pollino's backdating of the conspiracy from 1983 to 1982 and the circumstances surrounding that change in testimony; (2) Sheridan's backdating of the beginning of the conspiracy from 1983 to 1982 and the circumstances surrounding that change; and (3) that at the time the indictment against Petitioner issued, Pollino placed the beginning of the conspiracy in 1982 and Sheridan placed the conspiracy in 1983.

The date of the Ocean City meeting and thus the beginning of the alleged conspiracy was critical to the case against Petitioner. The date of the Ocean City meeting was intimately related to numerous other events occurring in 1982, 1983 and 1984. Changing the date of the Ocean City meeting from 1983 to 1982 obviously changed the way these events related to each other.

The trial court denied Petitioner's motion for new trial based upon the prosecution's concealment of *Brady* material on the grounds that Petitioner had not been prejudiced because he had learned of the changes in Sheridan's and Pollino's testimony during trial.[12] The trial court was apparently unconcerned that Pollino's change in testimony was fortuitously discovered by defendants during their cross-examination of Pollino. The prosecution's concealment of critical changes in the testimony of its key witnesses until the trial was well under way denied Petitioner an opportunity to investigate not only the changes in testimony but also the circumstances surrounding those changes.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment...." *Id.* at 87. In *Giglio*

[12]Sheridan testified on direct that he had changed the date of the Ocean City meeting. Pollino admitted that he had originally placed the Ocean City meeting in 1983 only on cross-examination.

v. United States, 405 U.S. 150 (1972), this court made clear that "when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence effecting credibility falls within this general [*Brady*] rule." *Id.* at 154. Information relating to changes in testimony by Petitioner's principal accuser was clearly *Brady* material which should have been disclosed.

This Court has held that exculpatory information is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1983). In *Bagley*, Justice Blackmun noted that in determining the materiality of exculpatory evidence suppressed in the face of a specific *Brady* request:

> [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. The reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

473 U.S. at 683.

The evidence suppressed by the prosecution — the backdating of the inception of the conspiracy and the circumstances underlying those crucial changes — was clearly material under *Bagley*. The suppressed information was of critical importance to the ultimate factual issues in the case against Petitioner — Sheridan's credibility and the prosecution account of how the conspiracy began. Had the information been disclosed to Petitioner before trial, as the prosecution promised, Petitioner would have been able to fully investigate the circumstances surrounding the remarkable changes in the testimony of the prosecution's two key

witnesses.[13] Moreover, the prosecution's suppression of exculpatory information not only prevented Petitioner from fully investigating the facts, it also deprived Petitioner of the opportunity to formulate, prepare and present an effective defense using the information concealed by the prosecution.

Indeed, this case is quite similar to the situation addressed by the Third Circuit in *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987), *cert. denied*, 108 S.Ct. 711 (1988). In *Carter*, the key government witness had testified previously in a manner implicating the defendant, but later recanted his testimony. However, when the witness was confronted by the prosecution with the results of a polygraph test purportedly showing the recantation to be false, the witness readopted his prior testimony.

The Third Circuit found that the government's failure to reveal to the defense the reason for the witness' change — even though the change itself was known — was material and required a new trial. *Id.* at 1309. There, as here, if defendants had known the circumstances which led to the revisions in testimony of the government's key witnesses, defendants would have been able to develop and present facts indicating that these witnesses were so malleable that they would have testified to any version they thought the prosecutors wanted to hear.

The prejudice in this case from the prosecution's failure to disclose the particulars of Pollino's and Sheridan's identical changes in their testimony surpasses that present in *Carter*. Pollino's and Sheridan's shuffling of the sequence of events comprising the alleged conspiracy went far beyond a mere change of date. These changes in testimony were critically important because they undermined the very foundation of the prosecution's case at trial — that Petitioner had initiated the conspiracy. Stated otherwise, when Pollino initially informed the prosecution that the alleged meeting

[13]Sheridan's explanation for his sudden change in story opened an entirely new area of investigation Petitioner could and would have pursued prior to trial. Sheridan testified that six weeks before trial, the government showed him a completely innocuous note indicating that Sheridan had telephoned Petitioner. Sheridan claimed that this document caused him to suddenly recall that the conspiracy had begun in 1982 and not 1983. However, Sheridan did not recall any of the details of the call, including from where he made it.

in Ocean City with Harford occurred in 1983, his account could not possibly have supported the theory ultimately presented at trial — that the Ocean City meeting was the first conspiratorial meeting. Indeed, Pollino had himself previously testified that he had both instigated and attended earlier price fixing meetings.

Similarly, when Sheridan originally told the government that the first conspiratorial meeting was in Ocean City in 1983, and that Petitioner had instigated that meeting immediately prior thereto, Sheridan's testimony as to how these meetings related to the earlier meetings of which he was aware must have been very different. In short, the change of the date of the critical Ocean City meeting, now alleged to have started the conspiracy, must have been accompanied by other major substantive changes in testimony regarding how, and by whom, the conspiracy was started. Whatever Pollino and Sheridan told the government about how the conspiracy began at the time they placed the Ocean City meeting in 1983 had to be very different from the government's theory of the case at trial.

The prosecution's failure to honor its promise to produce *Brady* information before trial denied Petitioner due process and warranted a new trial. This Court should grant certiorari and reverse the conviction below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean , Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007
(202) 342-5200

Of Counsel

Alan Dershowitz, Esquire
and
Elizabeth A. Boggs, Esquire
Of Counsel
232 Brattle Street
Cambridge, MA
(617) 495-3100

Appendix A

United States Court Of Appeals For The Fourth Circuit

No. 88-5139

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

JAMES J. HARFORD,

Defendant - Appellant.

WASHINGTON LEGAL FOUNDATION Amicus Curiae

No. 88-5140

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

MORTON M. LAPIDES

Defendant - Appellant.

WASHINGTON LEGAL FOUNDATION Amicus Curiae

No. 88-5146

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

ALLEGHENY BOTTLING COMPANY

Defendant Appellant.

WASHINGTON LEGAL FOUNDATION Amicus Curiae

No. 88-5147

PEPSICO, INC .; Appellant

UNITED STATES OF AMERICA
v. Plaintiff - Appellee

ALLEGHENY BOTTLING COMPANY Defendant

WASHINGTON LEGAL FOUNDATION Amicus Curiae

Appeals from the United States District Court for the Eastern District of Virginia, at Norfolk. Robert G. Doumar, District Judge. (CR-87-123-N)

Argued: December 6, 1988 Decided: January 11, 1989

Before PHILLIPS, CHAPMAN, and ERVIN, Circuit Judges.

Kenneth E. Newman (Daniel J, Thomasch, Christopher P. Johnson, Michele M. Jette, DONOVAN, LEISURE, NEWTON & IRVINE; Conrad M. Shumadine, Jeffrey H. Gray, WILLCOX & SAVAGE, P.C., on brief); James Hamilton Walsh (Larry D. Sharp, Hugh M. Fain, III, MCGUIRE, WOODS, BATTLE & BOOTHE, on brief); Robert K. Morse (David K. Monroe, Peter J. Petesch, GALLAND, KHARASCH, MORSE & GARFINKLE, P.C.; Wayne Lustig, GUY, CROMWELL, BETZ & LUSTIG, P.C.; A. Raymond Randolph, Daniel I. Prywes, PEPPER, HAMILTON & SCHEETZ; Kenneth R. Feinberg, David O. Bickart, Winthrop M. Swenson, L. Elise Dieterich, KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, on brief) for Appellants. (Michael P. McDonald;' Daniel J. Popeo, Paul D. Kamenar, Vicki S. Marani, WASHINGTON LEGAL FOUNDATION, on brief) for Amicus Curiae. Andrea Limmer (Charles F. Rule, Assistant Attorney General, Kenneth G. Starling, Deputy

Assistant Attorney General, John J. Powers, III, Laura Heiser, David C. Jordon, Terrence F. McDonald, UNITED STATES DEPARTMENT OF JUSTICE, on brief) for Appellee.

PER CURIAM:

Appellants Morton G. Lapides, James J. Harford and Allegheny Bottling Company ("AP") appeal their convictions of conspiring to fix prices of soft drinks sold by AP and its primary competitor, Mid-Atlantic Coca-Cola Bottling Company, Inc. ("MAC"), between 1982 and 1985 in the Richmond, Norfolk and Baltimore areas in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Pepsico, Inc., which bought the Pepsi-Cola franchise of AP in 1985, appeals the sentence imposed upon AP by the trial court. AP was sentenced to a fine of $1,000,000 and to three years imprisonment. The imprisonment was suspended and AP was placed on probation for three years with special conditions of probation that required AP to provide four officers and employees "of comparable salary and stature" as the former president and three vice presidents of AP to each perform 40 hours of community service per week for two years in the Baltimore, Norfolk and Richmond areas.

We affirm the convictions of all appellants, and we affirm the $1,000,000 fine of AP, which amount has already been paid, and we reverse that portion of the AP sentence which provided for imprisonment, probation and special conditions of probation.

I.

This is the second appeal we have heard arising from convictions related to the Sherman Act violations of various officers and employees of the Coca-Cola and Pepsi-Cola bottling operations in the Norfolk, Richmond and Baltimore areas. In *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988), we affirmed the conviction of Armand Gravely, who at one time was division manager for AP in the Richmond area. We now consider the convictions of Al-

legheny Bottling Company, which was the Pepsi-Cola franchisee in the Richmond, Norfolk and Baltimore areas, Morton M. Lapides, who was chairman of AP and James J. Harford, who was president of Mid-Atlantic Coca-Cola Bottling Company, Inc., the Coca-Cola franchisee in these same areas. All of the appellants claim that the evidence against them was not sufficient to support a verdict of guilty, that the trial judge was convinced prior to the trial that all defendants were guilty, that the trial judge allowed his personal beliefs of guilt to affect his conduct of the case, and thereby denied the appellants the right to a fair and impartial trial, that the trial judge interjected himself into the trial and became an advocate for the prosecution and interfered with the defendants' examination and cross-examination of various witnesses, that the trial judge allowed evidence of vicarious criminal liability to be erroneously interjected into the case, that the trial judge erred in admitting certain hearsay declarations of Deborah Hitchings and made other erroneous evidentiary rulings.

On the claims of insufficiency of the evidence, we are bound by the rule laid down years ago in *Glasser v. United States*, 315 U.S. 60, 80 (1942): "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." The evidence presented by the government was sufficient to meet the *Glasser* test as to all appellants. The evidence showed that between 1982 and 1985 AP and MAC competed for the soft drink business in the Baltimore, Richmond and Norfolk areas, and that together they controlled at least sixty percent of the soft drink sales in these markets. Although both companies operated in other markets, the price fixing, which is the subject of the present appeal, occurred in the Baltimore, Richmond and Norfolk markets, and it involved primarily 12 ounce cans, 16 ounce non-returnable bottles and 2-1iter bottles. During the time in question, both bottlers issued promotional letters to their customers. The letters listed the wholesale price of the products and set forth any promotional discounts applicable. These promotional letters went to convenience stores, grocery chains, and other large purchasers, and the promotional discount was the price off of the wholesale price the customer would pay if it fulfilled certain promotional conditions such as advertising,

prominence of display in the store, etc. The promotional letters were usually effective for about a month and were sent out several weeks before their effective date.

The crux of the conspiracy was the agreement by AP and MAC to fix the prices and adhere to the prices listed in their promotional letters, and not to reduce the price by offering larger discounts to some of their customers. The conspiracy was proved by the testimony of officers and employees of both AP and MAC. One of the most important witnesses was Jerry Pollino, a vice president of AP. He had worked with appellant James Harford when they were both employed by Canada Dry. In the spring of 1982, Morton M. Lapides called AP president, James Sheridan, and Jerry Pollino to a meeting and stated his concern that MAC was deviating from the prices listed on its promotional letters and was offering bigger discounts to some customers. He suggested that since Pollino and Harford had previously worked together, that Pollino arrange a meeting with Harford at the convention of the Maryland Soft Drink Association and discuss with him the adhering by both companies to the prices stated in their promotional letters. This meeting took place and Harford agreed to look into the reasons for any deviations by MAC and both men agreed that they would stick to the prices set forth in their promotional letters in the future. The results of this meeting were reported to Sheridan and Lapides.

Although the original agreement was between top management of the two competitors, compliance with the agreement became the work of the managers in Norfolk, Baltimore and Richmond. Jerry Pollino testified that he and Reginald Coe, MAC'S Baltimore division vice president, had numerous meetings and telephone conversations between September 1982 and January 1985 in which they discussed their pricing, their promotional letters, and they agreed on future promotional discounts. This testimony was confirmed by Coe. There was testimony from other officers and employees of both companies about meetings and agreements as to price. Most of these witnesses were granted immunity pursuant to 18 U.S.C. § 6001, *et seq.* This testimony was supported by various documents, and a convincing case of price fixing was presented by the prosecution and believed by the jury.

II.

There was sufficient evidence to sustain the conviction of Lapides of a conspiracy to fix prices in restraint of trade. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits contracts, conspiracies and combinations in restraint of trade. Agreeing with a competitor to fix prices of similar products in a market is the typical horizontal price-fixing forbidden by the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-225 (1940).

Both Sheridan and Pollino testified that Lapides conceived the idea of a price-fixing arrangement with MAC and he suggested the time and the place of the first meeting between Pollino and Harford. The testimony was also sufficient to establish that Lapides kept in close touch with the progress of the pricing agreement, and he made suggestions and gave orders as to how to proceed at various times. He also suggested cover stories for meetings between MAC and AP officials so that the meetings could be explained in an innocent light. There is no merit to his claim that the prosecution improperly argued to the jury or tried him on a theory of "vicarious liability" because of what "he should have known." There was sufficient evidence to convict Lapides by what he did, what he said, and the orders he gave his employees in furtherance of the conspiracy.

III.

We find no merit to Harford's claim that his motion for severance should have been granted because of the prejudicial spillover effect of evidence admitted against other defendants. Under Federal Rule of Criminal Procedure 12(b)(5) a motion for severance must be made before trial. Harford did not do this although there was a period of more than five months between the indictment and the trial, and he was aware from pretrial motions and the testimony in *Gravely* as to what evidence to expect at his trial. His failure to file a timely motion waived his right to a severance. *United States v. Moreno Morales*, 815 F.2d 725 (1st Cir.), *cert. denied*, 108 S.Ct. 458 (1987).

There was ample evidence to support the conviction of Harford. Pollino testified about his meeting with Harford at the Maryland Soft Drink Association in Ocean City and their agreement that each would stay with the published price in the promotional letter. Harford had other meetings and telephone conversations with Pollino and Sheridan that were in furtherance of the conspiracy.

IV.

We find no merit to the appellant's claims that the trial judge demonstrated pretrial bias, acted as an advocate for the prosecution, unfairly chastised the defense counsel, improperly questioned witnesses or impeded the examination or cross-examination of witnesses by defense counsel or otherwise conducted the trial in a manner partial to the prosecution. We have carefully reviewed the record and find that almost all of the court's comments to which the appellants object were made in the absence of the jury and they did not disparage defense counsel or defendants in the eyes of the jury. This was a long, hard-fought and hotly contested trial. In the course of such a proceeding, tempers become frayed and statements are made in anger, but we find nothing to support any claim of bias or improper conduct on the part of the trial judge. His questions to witnesses were asked in an effort to clear up misunderstandings, and his claimed interruption or interference with cross-examination was an effort to prevent repetition and to move along a trial that eventually consumed seven weeks.

V.

We find no merit to the claims of error in jury instructions. Viewing the charge in its entirety, the court properly covered all of the necessary legal points and adequately charged on the appellants' theories of defense.

VI.

We find no error in the admission of the statements of Deborah Hitchings through the testimony of Theodore Rivers.

The testimony was sufficient to find that Hitchings, as a marketing representative of MAC, was a co-conspirator, and that her statements to Rivers that she could not give him a lower price, and he could not get a lower price from Pepsi (because of the agreement AP and MAC had to adhere to a minimum price of $5.50 a case) was made in furtherance of the conspiracy and was therefore admissible under Evidence Rule 801(d)(2)(E).

VII.

Following conviction, the district court fined AP $1,000,000, which was the maximum punishment for a corporation under the Sherman Act, but the court added a three-year term of imprisonment. Execution of the sentence of imprisonment was suspended, together with $50,000 of the fine. AP was also placed on probation for three years with special conditions that it be required to provide four individuals of comparable salary and stature to individuals the court found to be involved in the conspiracy who would perform 40 hours of community service each week for a two year period. AP promptly paid the $1,000,000 fine, and it now correctly asserts that the efforts of the district court to imprison it or place it on probation with special conditions are beyond the power of the court. This part of the sentence is a nullity. The government has conceded error on this point. In *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959), the Supreme Court clearly held that a corpporation may not be sent to jail. The language of 15 U.S.C. § 1 is abundantly clear that $1,000,000 is the maximum a corporation may be fined for violating this section, and there are no additional or alternate sanctions which would even suggest imprisonment or probation of a corporation. Therefore, the case must be remanded to the district court to correct the sentence imposed upon AP so as to remove everything except the $1,000,000 fine.

AFFIRMED AS TO ALL CONVICTIONS:
REMANDED TO CORRECT THE SENTENCE
OF ALLEGEHENY BOTTLING COMPANY.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL NO. 87-123-N

ALLEGHENY BOTTLING COMPANY,
MORTON M. LAPIDES and
JAMES J. HARFORD,

Defendants.

OPINION AND ORDER

On May 19, 1988, all three of the defendants in this trial[1] were convicted after a seven-week jury trial of conspiracy to fix the prices of soft drinks in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. After the jury returned the guilty verdicts, defendants Harford and Lapides each moved for judgment of acquittal pursuant to Rule 33, and in the alternative, for a new trial pursuant to Rule 29(c). Defendant Allegheny Bottling Company moved for a new trial. All of the defendants' motions were fully briefed and argued before this Court. For the reasons discussed below, these motions are DENIED.

I. BACKGROUND

This case arose from a conspiracy between the Mid-Atlantic Coca-Cola Bottling Company (Mid-Atlantic Coke) and the defendant Allegheny Bottling Company (Allegheny Pepsi), formerly Allegheny Pepsi-Cola Bottling Company to fix soft drink prices. All three of the defendants in this trial were convicted of participating in the conspiracy.

[1]Odis R. Allen, a fourth defendant under this indictment, pled guilty without benefit of any plea agreement prior to the beginning of this trial.

The indictment charged Allegheny Pepsi, Lapides, Harford, and Odis R. Allen with conspiracy to fix prices of soft drinks between 1982 and January 1985 in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1. The price-fixing allegedly occurred between Allegheny Pepsi and Mid-Atlantic Coke in the Baltimore, Maryland, and the Richmond and Norfolk, Virginia divisions of both companies. [2]

During most of the time alleged in the indictment, Harford was the president of Mid-Atlantic Coke.[3] Lapides was Chairman of the Board of Allegheny Pepsi, the defendant, as well as the parent corporation, Allegheny Beverage Corporation (Allegheny Beverage). Odis R. Allen was a vice president of Mid-Atlantic Coke.

Numerous pre-trial motions were heard and decided. On March 22, 1988, Odis R. Allen pled guilty with no plea agreement. The trial began on April 4, 1988, and lasted seven weeks, culminating on May 19, 1988. On May 19, 1988, the jury found all of the remaining defendants guilty.

The President of Allegheny Pepsi, James Sheridan, had previously pled guilty to participation in a price-fixing conspiracy and had already completed his sentence of incarceration prior to this trial. Mid-Atlantic Coke had also previously pled guilty to a price-fixing conspiracy, and Armand Gravely, the Allegheny Pepsi Richmond division manager, had been found guilty of participation in a price-fixing conspiracy as well as obstruction of justice. See *United States v. Gravely*, 840 F.2d 1156 (4th Cir. 1988).

Certain officers of Allegheny Pepsi and Mid-Atlantic Coke were granted immunity, namely Stanley Fabian and Jerry Pollino, vice presidents of Allegheny Pepsi, as well as Bud Coe, a vice president of Mid-Atlantic Coke.

Allegheny Beverage, the parent of Allegheny Pepsi at the time of the alleged conspiracy, hired all of the attornies for the

[2]The areas served by each division extended beyond the particular city. The Norfolk and Richmond divisions of Allegheny Pepsi tended to overlap in the Williamsburg, Virginia area and the Norfolk division of Mid-Atlantic Coke included parts of eastern North Carolina.

[3]At time of trial he was President of the Seven-Up Company.

current and former employees of Allegheny Pepsi and Allegheny Beverage potentially implicated in the conspiracy. Mid-Atlantic Coke did the same. The attorneys for Allegheny Pepsi and the Allegheny Pepsi employees reported to each other concerning the interviews of witnesses by the government as well as the grand jury appearances of the employees. The grand jury testimony of the defendants, as well as both the *Brady* and *Jencks* material, statements and testimony, including grand jury transcripts, were furnished to the defendants prior to trial.

Allegheny Pepsi was a wholly-owned subsidiary of Allegheny Beverage. Allegheny Beverage was a publicly held corporation with two classes of stock. All of the superior class of stock was owned by the defendant Lapides. This ownership interest entitled Lapides to select five of the nine members of Allegheny Beverage's board of directors. Tr. at 6088. Lapides was also the largest single stockholder of the second class of common stock. As of March 26, 1984, there were 5,979,933 shares of common stock outstanding with an aggregate market value of common stock held by non-affiliates of approximately $62,000,000.00. Exhibit 279 at 1. These shares were held by 5,940 holders of record. *Id.* at 10. These 5,940 shareholders could select four of the members of the board of directors. Lapides testified, however, that no one had ever been elected to the board over his objection. Tr. at 6088.

The conspiracy involved in this case originated in June of 1982 and consisted of a continuing agreement to adhere to the prices published by each company in each of its promotional letters. These promotional letters offered the cola products at a stated price less a discount based on certain promotional activity by the retailer. However, these discounts could be obtained with so little effort (a sign in the window or on a display rack) that the promotional price became in effect the net regular price. These promotional letters were issued to customers on a regular basis, approximately monthly, with certain special letters issued periodically.

In 1981 and well into 1982, Allegheny Pepsi and Mid-Atlantic Coke were embroiled in fierce competition. Both companies frequently discounted below the promotional prices that they

offered in promotional letters.[4] Thus, the prices at which the cola products were actually being sold were below the prices shown in any written price list or publication. This additional discounting below promotional letter pricing was sometimes referred to as "deep discounting". The initial goal of the price fixing was to stop "deep discounting". The agreement resulted in stabilizing and fixing the prices of soft drinks in the Richmond, Norfolk, and Baltimore areas of these respective companies.

The government presented overwhelming evidence of a pricefixing conspiracy. Officers of both companies testified that they had met on numerous occasions to discuss, and that they agreed to adhere to their promotional letter prices, eliminating deep discounting. They testified to numerous telephone conversaions between themselves relating to the fixing of prices. These officers also testified to meeting and agreeing to police the agreement when some deep discounting took place. These meetings were corroborated by credit card chits and company expense vouchers which document the dates and locations of many of these meetings, as well as intra-company correspondence corroborating the agreements.

The corporate officers so testifying included James Sheridan, the President of Allegheny Pepsi; Jerry Pollino, the Vice President of Sales for Allegheny Pepsi and the Baltimore market division manager; Stanley Fabian, an Allegheny Pepsi vice president and division manager for Norfolk; and Bud Coe, the Vice President of Mid-Atlantic Coke's Baltimore division.

In addition to this extensive testimonial evidence, the government introduced empirical evidence in the form of promotional letter price fluctuations, or the lack thereof, over the period of the conspiracy. For example, the government showed that prior to the effectuation of the conspiracy, the price of 16-ounce nonretur-

[4]Mid-Atlantic Coke, a highly leveraged company, was created in June 1980 by bringing together many former local bottling companies with Coke franchises into a multi-state conglomerate. Allegheny Pepsi was developed from a Lapides' family franchise which began in 1931. The defendant, Morton Lapides, took over the company and began buying up local Pepsi franchises creating a multi-state organization.

nable bottle cola cases in Baltimore for both companies fluctuated around $6.00 to $6.40 per case. In November of 1982, the price fluctuation on this item stopped when both companies set the price at $6.80 and held it there for over a year until December 1983 without deviation or discounting. In 1984, both companies increased the price to $7.20 per case without deviation or discounting. These parallel and coordinated price increases, as evidenced by the prices published in the promotional letters of both companies, and Coe's testimony, clearly showed a stabilized and inflationary market, a market vastly different from the highly competitive preconspiracy market.

In the Richmond area, after the agreement, the Allegheny Pepsi branch manager gave a discount to an important account as he had previously done on numerous occasions. When his superior, the division manager, learned of this action, he was most upset. Ultimately, the division manager docked the pay of the branch manager for the amount of the deep discount that he had authorized. In the Norfolk area, when a Virginia Beach motel operator tried to get a lower price for cola products and threatened to change bottlers as he had previously done, he was told that it would not do him any good to change bottlers as Mid-Atlantic Coke and Allegheny Pepsi had agreed to charge the same prices.

The evidence against Allegheny Pepsi adduced at trial was so comprehensive and so overwhelming as to defy imagination. The evidence introduced to prove the involvement of the defendants Lapides and Harford, although perhaps less than overwhelming, was considerable. This evidence will be reviewed and evaluated below.

II. DISCUSSION

Defendants Lapides and Harford have moved for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29, and alternatively, for a new trial pursuant to Rule 33. Defendant Allegheny Pepsi has moved for a new trial. Each defendant's motions will be considered separately.

A. Defendants Lapides and Harford

Defendants Lapides and Harford's Rule 29 motions for acquittal require the Court to determine whether, viewing the evidence most favorably to the government, the jury's guilty verdicts are supported by substantial evidence. *United States v. Steed*, 674 F.2d 284, 286 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 829, 103 S. Ct. 67 (1982); *White v. United States*, 279 F.2d 740, 748 (4th Cir.), *cert. denied*, 364 U.S. 850, 81 S. Ct. 96 (1960). The thrust of the substantial evidence test is whether the evidence "could be accepted by a reasonably-minded jury as adequate and sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979). In determining whether the jury's verdict is supported by substantial evidence, the Court neither weighs the evidence nor reviews the credibility of witnesses. *United States v. Arrington*, 719 F.2d 701, 704 (4th Cir. 1983) [*Arrington* I], *cert. denied*, 465 U.S. 1028, 104 S. Ct. 1289 (1984).

The standard for reviewing the sufficiency of evidence under Rule 33 is less exacting to the defendants. Under Rule 33, a new trial should be ordered if "required in the interest of justice". Fed. R. Crim. P. 33. In *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985) [*Arrington* II], the Court of Appeals stated:

> In deciding a motion for a new trial, the district court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus it may evaluate the credibility of the witnesses. When the evidence weighs so heavily against the verdict that it would be unjust to enter judgment, the court should grant a new trial.

This Court will separately consider the evidence relating to defendants Lapides and Harford's involvement in the conspiracy in light of the foregoing legal framework.

1. Defendant Lapides

Although distinguishing defendant Allegheny Pepsi from defendant Lapides is not as easy a task as might be initially presumed, the evidence of Lapides' personal involvement in the

price-fixing conspiracy forecloses the possibility that the jury convicted Lapides merely because he was the person that in a very real sense ran and controlled Allegheny Pepsi. The evidence tying Lapides to the conspiracy was both direct and circumstantial. There was direct evidence of Lapides' active involvement in at least one conspiratorial meeting and of Lapides' knowledge of numerous other meetings. Additionally, evidence clearly demonstrated that although Lapides did not oversee the day-to-day operations of Allegheny Pepsi, Lapides was firmly in control. In a very real way Lapides micromanaged Allegheny Pepsi. The jury could have reasonably utilized this evidence to discount Lapides' denial of involvement in the price-fixing conspiracy.

The direct evidence against Lapides consisted mostly of the testimony of James Sheridan and Jerry Pollino. Sheridan testified that Lapides initiated the price-fixing conspiracy and directed Pollino to contact Harford, the President of Mid-Atlantic Coke, at the Maryland Soft Drink Association Convention in June of 1982 in Ocean City, Maryland, to work out a pricing agreement that would eliminate deep discounting in the marketplace. Tr. at 439-443. These instructions were given by Lapides in May of 1982 to Sheridan and Pollino. Tr. at 439; 2050. Although Pollino testified differently with regard to the details of the meeting where these instructions were given,[5] he corroborated Sheridan's testimony that such a meeting occurred and testified further that he left the meeting with the distinct understanding that he was to meet

[5]Pollino recalled the meeting as a very brief stand-up meeting in Mr. Conn's office and with Sheridan doing most or all of the talking. Tr. at 2050-2051. According to Pollino, Lapides merely assented to the planned meeting with Harford. Tr. at 2051, 2055. Although initially testifying that the purpose of Pollino meeting with Harford was not discussed during this meeting, Tr. at 2051, Pollino further testified that Sheridan told Lapides that Pollino was going to "get with" Harford at Ocean City and it "may or may not have been said to discuss problems, whatever." *Id.* Pollino testified that "problems" referred to deep discounting. Tr. at 2054. When asked whether deep discounting had been mentioned at this meeting with Lapides and Sheridan, Pollino responded "I don't really recall." Tr. at 2054. Sheridan recalled this meeting as lasting 45 minutes in Lapides' office and that Lapides affirmatively directed Pollino to meet with Harford to discuss adherence to the promotional or pricing letters that Allegheny Pepsi and Mid-Atlantic Coke distributed to their customers. Tr. at 439, 442, 1170.

with Harford regarding eliminating deep discounting by Allegheny Pepsi and Mid-Atlantic Coke. Tr. at 2051-2054.

Pollino testified that on June 12, 1986, he met with Harford in Ocean City. At this meeting, Pollino and Harford discussed deep discounting and reached an agreement that their respective salespeople would strictly adhere to the prices listed in the promotional letters published by their companies. Tr. at 2048, 2098. Pollino reported the result of this meeting to Sheridan, Tr. at 466, who in turn reported the result of the meeting to Lapides. Tr. at 474-475.

Sheridan also testified that throughout the conspiracy period he kept Lapides informed of the various conspiratorial meetings between Allegheny Pepsi and Mid-Atlantic Coke employees. Tr. at 480-481, 506-507, 528-529. Sheridan testified that he informed Lapides of these developments pursuant to an ongoing direction from Lapides that the price-fixing agreements be maintained and that any deviations from the agreements or corrections of such deviations be reported to Lapides. *Id.* Sheridan specifically testified that he reported to Lapides concerning a meeting regarding policing of an agreement applicable in the Norfolk area in mid-1983 (the Intermission Restaurant meeting between the Mid-Atlantic Coke and the Allegheny Pepsi division managers for Richmond and Norfolk and Pollino), Tr. at 480-481, a meeting between Pollino, Sheridan, and Harford at the Richmond Hyatt, Tr. at 506-507, and a meeting between Pollino and Mid-Atlantic Coke's Norfolk division manager at the Norfolk Airport in May of 1984. Tr. at 579. Sheridan also testified that he reported to Lapides the results of his September 21, 1983, meeting with Harford at the Howard Johnson's in Cheverly, Maryland concerning what effect Allegheny Pepsi's adoption of a new cost-saving shrink wrap packaging would have on the price-fixing agreement. Tr. at 528-529.

Sheridan also testified that at an Allegheny Pepsi monthly statement review meeting, he and Pollino met with Lapides in Mr. Conn's empty office and discussed the various pricing agreements between Allegheny Pepsi and Mid-Atlantic Coke. Tr. at 529-530, 532-533. At this meeting with Sheridan and Pollino, Lapides

expressed his displeasure with Allegheny Pepsi's sales performance during the preceeding month and wanted to know why the performance was not better if in fact there were pricing agreements with Mid-Atlantic Coke. Tr. at 532. Sheridan and Pollino then briefed Lapides concerning deviations from the agreements and the steps taken to correct those deviations. Tr. at 532-533. Sheridan testified that following this briefing Lapides directed he and Pollino to get together with the Allegheny Pepsi division managers for the Norfolk and Richmond areas after the statement review meeting and to "make sure that they [are] aware that this ongoing cooperation and agreements [have] got to be adhered to and [to] make sure that they [get] back with their counterparts at Mid-Atlantic Coke and make sure it happened." Tr. at 533. Pollino testified extensively regarding his contacts with employees of Mid-Atlantic Coke but equivocated considerably concerning the specific involvement of Lapides. Pollino did testify unequivocally, however, that Lapides was aware of the pricefixing contacts between Allegheny Pepsi and Mid-Atlantic Coke. Tr. at 2089.

There was also an abundance of evidence that Lapides' hand firmly controlled Allegheny Pepsi. All of the Allegheny Pepsi officers appearing at trial testified that Lapides would regularly send scathing memos directly to Allegheny Pepsi officers — either singularly or collectively — highlighting areas of concern to Lapides. These memos were designated "Missiles from Mort".[6] Tr. at 5994-5995. Pollino testified that Lapides once called him at home on a Saturday night and directed him to bring a Pepsi shipment to a restaurant that Lapides discovered had no Pepsi on hand. Tr. at 2801-2802. Further, evidence indicated that Lapides received Allegheny Pepsi's daily sales reports. Tr. at 2319. Lapides read these reports and periodically called employees with inquiries about them. Tr. at 542-543, 2319, 5993-5994. Moreover, Lapides himself demonstrated his absolute power when he testified regarding a meeting where he announced his decision to implement a controversial new computer system designed by his

[6]In one such "missile", Lapides indicated his concern over the Baltimore plant's increase in expenses for "miscellaneous and cleaning supplies." Gov't. Exh. 76 ¶ 10. The manager of this plant testified during trial that this particular item in his budget totaled a few thousand dollars a month. Tr. at 1409.

son. Lapides testified that he didn't think that "there was one person at the meeting that dared say that they thought it was a poor program." [7] Tr. at 6084. The evidence adduced at trial clearly demonstrated that Lapides controlled Allegheny Pepsi from its president down to its drivers in a fashion described by his own attorney as perhaps that of "a tyrant".

a. Lapides' Rule 29 Motion

Lapides asserts that this evidence is not substantial as a matter of law because of "direct conflicts" in the government's case on the issue of his involvement in the conspiracy.

To be sure, the government's case against Lapides does contain inconsistencies with respect to minor as well as major details. For example, while Sheridan testified that the conspiracy was conceived in a 45-minute meeting in Lapides' office and that Lapides initiated the conspiracy at this meeting by directing Pollino to meet with Harford on pricing, Pollino testified that the meeting was a very short stand-up affair in Mr. Conn's office and that Sheridan did most or all of the talking with Lapides merely nodding his assent. Based on these conflicts, Lapides asserts that Rule 29 requires the Court to give "due credit to the testimony of the government's witnesses" and that, giving "full credit" to Pollino's and Sheridan's testimony leads to the conclusion that there is an "inescapable and fatal conflict in the government's case" and that defendant Lapides must therefore be acquitted.

This argument clearly misperceives the proper standard for evaluating the sufficiency of the evidence under Rule 29. Under this rule, and the cases interpreting it, the Court must take as true all reasonable inferences *favorable* to the government. However, there is no requirement that the court accept all reasonable inferences from all government witnesses' testimony whether or not they support the jury's verdict. Indeed, Lapides has not cited a single authority to support his proposition. Accordingly, the Court concludes that the mere fact that the government case contains

[7] Because Sheridan had opposed this computer system, Lapides held the meeting without Sheridan, the president of the company, and personally arranged the system's implementation.

conflicting evidence on key issues does not require acquittal as a matter of law.

The question remains, however, whether the evidence supporting the jury verdict is substantial. The defendant correctly states that while the Court cannot assess the credibility of witnesses or weigh the evidence, *Arrington* I, 719 F.2d at 704, it is not required to completely abdicate to the jury's findings. *See United States v. Peterson*, 488 F.2d 645 (5th Cir.), *cert. denied*, 419 U.S. 828, 95 S. Ct. 49 (1974). After considering the evidence which supports the jury's verdict, as well as the countervailing evidence, the Court must determine whether a reasonable mind could fairly conclude guilt beyond a reasonable doubt. *Burns*, 597 F.2d at 941.

Clearly, Sheridan's testimony unequivocably implicated Lapides in both the inception and maintenance of the conspiracy. Sheridan was the President of Allegheny Pepsi. Sheridan's office was down the hall from Lapides' office. Sheridan testified from first-hand knowledge of Lapides' involvement and Lapides' management style. Lapides was Sheridan's immediate supervisor. Sheridan reported directly to Lapides. Tr. at 386-387, 1385. If Sheridan's testimony is believed, a reasonable mind could fairly conclude beyond a reasonable doubt that Lapides was guilty. Moreover, Sheridan's testimony of Lapides' extensive involvement in the management of Allegheny Pepsi was corroborated by the testimony of Pollino, Fabian and others. Also, significant portions of Sheridan's testimony relative to Lapides' personal involvement in the conspiracy was corroborated by Pollino (e.g., Pollino corroborated Sheridan's testimony that the conspiracy was instigated at a meeting between himself, Sheridan and Lapides).

Lapides argues that the countervailing evidence is so compelling that Sheridan's testimony should be declared incredible as a matter of law or at least diminished to insubstantiality. This countervailing evidence consisted of evidence purportedly inconsistent with Lapides' involvement,[8] Lapides' denial on the witness

[8]Lapides introduced evidence that he sued Mid-Atlantic Coke for predatory pricing during the time of the conspiracy, that he considered Mid-Atlantic "the enemy" and that he even considered complaining to the Justice Department about Mid-Atlantic pricing practices. Lapides claimed that this evidence was inconsistent with a price-fixing agreement between the companies. However, it is not necessary

stand, and impeachment evidence relative to Sheridan's credibility. However, Lapides had ample opportunity to present this evidence at trial and ably did so. This evidence was interpreted differently than Lapides desired by the jury and this Court does not find this evidence inherently inconsistent with Sheridan's testimony.

The jury resolved the conflicts between the government's evidence and Lapides' denial of involvement in or knowledge of the conspiracy as well as any inconsistencies in the government's case. The jury also answered the qestions of the witnesses' credibility. Under Rule 29, the Court cannot interpose a different view of the evidence at this juncture or second-guess the jury's resolution of these issues simply because Lapides cites conflicts in the evidence and a potential basis for not believing a witness. As noted above, the evidence supporting the verdict against Lapides is more than substantial and is therefore legally sufficient.

Accordingly, the Court finds the jury's verdict convicting Lapides supported by substantial evidence. Lapides' Rule 29 motion is denied.

b. Lapides' Rule 33 Motion

1. The Conviction of Lapides is Not Against the Weight of Evidence.

As discussed above, the standard for evaluating the evidence under a Rule 33 motion is less exacting to the defendant than that required under Rule 29.

Lapides asserts that the evidence adduced at trial weighs against the guilty verdict returned against him because Sheridan's testimony was not credible and because it was outweighed by evidence inconsistent with any involvement by Lapides in the conspiracy.

As discussed above, there were a number of inconsistencies in the government's case, including inconsistencies between

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that the parties to an agreement like each other. Indeed, the jury may have concluded that the predatory pricing suit and the conception of Mid-Atlantic Coke as "the enemy" were additional manifestations of a highly competitive market which the companies sought to control through the pricefixing conspiracy.

Sheridan's and Pollino's recollections of the details of certain conspiratorial meetings. Also, Lapides has advanced several points relating to Sheridan's credibility. These include Sheridan's prior inconsistent statements and potential sources of personal animosity towards Lapides.

However, it appears to the Court that an objective and well-reasoned analysis of all the evidence clearly shows Lapides' involvement in the price-fixing conspiracy.

Lapides correctly points out that Sheridan was a key government witness. However, Lapides' attempts to undercut Sheridan's credibility fail to convince the Court that Sheridan was not substantially truthful.

Sheridan testified pursuant to a plea agreement under which Sheridan had pled guilty to price-fixing and had been given a sentence identical to that received by a co-conspirator who had been convicted after a jury trial of both price-fixing and obstruction of justice. Sheridan had already completed his incarceration prior to testifying in this trial. Lapides suggests that Sheridan may have testified under the plea agreement in order to avoid an additional conviction for obstruction of justice. However, although the agreement provided that Sheridan would not be prosecuted for any violation he admitted in his testimony, Sheridan denied any obstruction of justice when he testified. Tr. at 703-706.

Lapides also showed that Sheridan and Lapides had a disagreement regarding the computer system designed by Lapides' son for use by Allegheny Pepsi. Additionally, Lapides called witnesses who had a low opinion of Sheridan's reputation for truth and veracity. However, the Court is not convinced that Sheridan's long, detailed, and largely corroborated testimony was fabricated in order to satisfy his alleged personal animosity toward Lapides.

Lapides also states that Sheridan "continually looked over to the government counsel table before and after answering defense questions." However, the Court did not notice this, the government denied it, and at least three of Harford's counsel were in position where the witnesses and the government counsel were always within their view. They did not object or call any such coaching to the Court's attention during trial.

As discussed above with regard to Lapides' Rule 29 motion, Sheridan's testimony was corroborated not only by Pollino in several respects but also by circumstantial evidence. Pollino's testimony corroborated Sheridan's that there was a meeting between Lapides, Pollino, and Sheridan where Pollino and Harford getting together to discuss "problems" was discussed.[9] There was also abundant evidence of Lapides' firm management style. Lapides argues that this evidence would indicate that Lapides would have more actively communicated with his officers regarding the price-fixing conspiracy, as he did on numerous other matters. However, it is not difficult to imagine that Lapides might limit his personal involvement in order to insulate himself from criminal liability. At the same time, Lapides' style indicates that it is very unlikely that Lapides was truthful when he testified that he was unaware of the illegal pricing activities of his company. If this were true, Lapides would, oddly enough, perhaps be one of the few employees of Allegheny Pepsi that did not know about the price-fixing activities of this company.

Lapides argues further that his pursuit of a predatory pricing suit against Mid-Atlantic Coke and his general hostile attitude toward Mid-Atlantic were inconsistent with participation in this conspiracy. As noted above, however, there is no requirement that co-conspirators like each other. The only requirement is an unlawful agreement. The vigorous pursuit of the suit against Mid-Atlantic, which the court of appeals indicated could have properly resulted in a directed verdict against Allegheny Pepsi, indicates that Lapides was willing to take action to combat the competitive situation in the marketplace. Considering all of the evidence in this trial, it is beyond doubt that the action taken by Lapides included price-fixing.

Upon review of the evidence and considering the arguments ably advanced by Lapides and by the government, the Court finds that the jury's verdict is supported by the weight of the evidence and that a new trial is not required in the interest of justice.

[9]Pollino continued on the payroll of an Allegheny Beverage subsidiary after testifying before the grand jury. Pollino's attorney was paid for by Allegheny Beverage and Lapides' attorney interviewed Pollino prior to trial.

Indeed, it is clear to this Court that Lapides conceived of the idea of price-fixing with Mid-Atlantic Coke, directed Pollino to make the initial agreement and, through Sheridan, monitored and directed Allegheny Pepsi's widespread price-fixing.

2. Lapides' Arguments for a New Trial Based on the Prosecutors' Conduct of the Trial

Lapides also argues for a new trial on the grounds that the government's closing argument improperly included assertions predicated upon a legal theory rejected by the Court, that the government failed to disclose *Brady* material, and that the government attorneys improperly cross-examined Lapides and Harford. Each of these assertions will be considered below.

a. Improper Closing Argument

Lapides' contention arises from the portion of government counsel's closing argument which stated:

> In addition, as chairman of the board, and the controlling owner of the company, [Lapides] joined the conspiracy and was responsible for it by encouraging his subordinate employees, by authorizing their conduct, by condoning what was going on, by failing to take any action to stop the price fixing, when he clearly had the power to do so.

Tr. at 7081.

The government repeated this argument that Lapides' knowledge of the conspiracy, coupled with his failure to utilize his power to end the conspiracy, demonstrated his involvement in the conspiracy.[10] Lapides claims that with this argument, the government "knowingly misstated the law." Lapides' Post-Trial

[10]The other assertions in the government's closing argument stated as follows:

> In addition, like Lapides, Harford joined in and was responsible for the conspiracy by his failure to put a stop to the activities of his subordinates, that he knew the price fixing activities were going on.
>
> He knew about the price fixing. He encouraged it. He could have prevented it. ...
>
> ...

Memorandum at 58. Lapides further argues that "[i]t is ... impossible to say with any degree of confidence whether the jury convicted Mr. Lapides on the charge in the indictment or under the alternative theory of liability advanced in the government's closing argument." *Id.* at 62. This argument by the government, however, was not an alternative theory of liability at all.

On the liability of a corporate officer, the Court instructed the jury as follows:

> An individual is not held responsible on the basis of an act or omission of another person, such as a subordinate, unless you are convinced beyond a reasonable doubt that such defendant wilfully ordered, directed, or authorized the act [of] the subordinate in question.

Tr. at 7492.

Lapides previously took the position that any facts of Lapides' knowledge of the conspiracy and any failure on his part to stop known price-fixing would be relevant to the issue of Lapides' involvement or authorization of the conspiracy. While arguing the jury instructions, the following statements were made by the Court and Lapides' counsel:

> THE COURT: Why should I let this case go to the jury, when what you're saying is that if they prove, one, that he acquiesced in something, knew about it, had the power to stop it, that then that is not evidence that he consented to join?
>
> MR. MORSE: *No. That's the charge* I say *you should have*. And we have already talked about that at the end of 22. That's not the charge 13B. It doesn't say anything about some evidence.

> You may consider that defendants [sic] position -the defendant's position in his own company.
>
> ...
>
> You should take into account what he did or did not do in deciding whether an individual participated in a conspiracy.

Tr. at 7082, 7145.

> This says, you find two things, Your Honor. Ladies and gentlemen of the jury, all you have to find are two things. He knew, and that he knew about — and he failed to stop a subordinate who was doing it.
>
> And those are the only two things you need to find, ladies and gentlemen of the jury, he's guilty, and I'm directing a jury that way. That's what that instruction says, and that's what's wrong with that instruction. It's not that its evidence of something. You're directing a verdict.

Tr. at 6973-74.

The closing comments by government counsel were in full accord with Lapides' counsel's statements - they were a summation of facts from which the jury could infer that Lapides authorized the price-fixing activities of his subordinates. The government did not argue that the *only* findings necessary to convict were knowledge and failure to stop the activities. In fact, government counsel's argument was much more comprehensive, arguing that Lapides authorized subordinate conduct "by condoning what was going on, by failing to take any action to stop the price-fixing, when he clearly had the power to do so." This argument closely tracks the instructions given by the Court and found accceptable by Lapides. Clearly, the facts of Lapides' knowledge and acquiescence in the price-fixing activities of his subordinates support the inference that Lapides authorized the price-fixing and therefore "agreed" to fix prices, as alleged in the indictment. *See United States v. Gillen*, 599 F.2d 541, 547 (3rd Cir.), *cert. denied*, 444 U.S. 866, 100 S. Ct. 137 (1979).

The jury was fully instructed on all of the elements of the offense charged and directed to make a finding on each element in accordance with the applicable burden of proof. The jury was also instructed that if counsel referred to any rules of law in arguing the case, the jury was nevertheless governed by the law as charged by the Court, not as presented by counsel. *See* Tr. at 7448. The Court also instructed the jury that counsels' arguments discussed evidence, but that they were not evidence. *See* Tr. at 7456. In their closing arguments, all parties argued the proof on each element.

Accordingly, Lapides' exception to the government's closing argument is unavailing.

Lapides also advances a related argument. He asserts that the government counsel's argument relating to Lapides involvement in the conspiracy constituted an amendment of the indictment at trial. The government's argument that Lapides authorized the price-fixing activities of his subordinates, however, in no way altered the elements of the crime alleged in the indictment and therefore did not constitute a constructive amendment of the indictment. *See United States v. Miller*, 471 U.S. 130, 145, 105 S. Ct. 1811, 1819-1820 (1985); *Stirone v. United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 274 (1960).

b. Nondisclosure of Brady Material

Shortly before trial, and after reviewing a document produced by Harford, Sheridan's recollection changed regarding the year in which the meeting between Lapides, Pollino, and himself occurred. Sheridan initially recalled that this meeting occurred just before the Maryland Soft Drink Association Convention in Ocean City in the spring of 1983.

Before trial, Lapides had requested disclosure of exculpatory material in accordance with *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). While the government responded to this request with a number of disclosures, the fact that Sheridan's recollection of the year of this meeting had changed was not disclosed prior to trial. Lapides asserts that the nondisclosure of this potential impeachment evidence deprived Lapides of a fair trial and violated the *Brady* rule.

Evidence relating to a government witness' credibility falls under the *Brady* rule when it is material to the issue of guilt or innocence. *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 766 (1972). Sheridan was a crucial government witness and his credibility was material to the issue of Lapides' guilt or innocence. However, it is not necessary for the Court to determine whether this nondisclosure violated the *Brady* rule because Sheridan's changed recollection did not prejudice Lapides.

Government counsel disclosed the change in Sheridan's recollection during their opening statement. Sheridan testified to his change in recollection on direct examination and this issue was the subject of extensive cross-examination. If pretrial nondisclosure had prevented Lapides from utilizing any impeachment potential in this evidence, his argument would have potential merit. However, Lapides was afforded a full opportunity to introduce evidence of Sheridan's changed recollection regarding the date of the crucial meeting between Lapides, Pollino and himself at which the conspiracy was initiated. Any nondisclosure did not prevent the defense from developing this fact before the jury and cannot be said to have resulted in unfairness, prejudice, or injustice to Lapides.

The Supreme Court has stated that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 3379 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 104, 96 S. Ct. 2392, 2397 (1976)). Here, the "suppressed" evidence was fully utilized by Lapides at trial. There is no question of whether its earlier disclosure may have made the difference between conviction and acquittal of Lapides. *See Bagley*, 473 U.S. at 676, 105 S. Ct. at 3380.[11] Accordingly, the Court concludes that Lapides has stated no grounds for a new trial under *Brady*.

3. Improper Cross-Examination of Lapides and Harford

During cross-examination of Lapides and Harford, government counsel inquired concerning possible contacts or a meeting between Lapides and Harford on November 3rd or 4th, 1983, at the Richmond Hyatt. Because the government did not introduce any evidence of this meeting in its case-in-chief, Lapides asserts

[11]The Court does not read *Brady* and its progeny to allow the government to selectively and intentionally withhold exculpatory evidence until opening argument or later during trial as a tactical measure. However, when there is no indication that the government attorneys acted in bad faith and the defendant is afforded meaningful access and use of the evidence, as is the case here, than a new trial is not required under *Brady*.

that the government's questions on cross-examination concerning this possible meeting were improper and entitle him to a new trial.

After Harford was asked on cross-examination about this possible meeting, counsel for Lapides and Harford objected to this question on the ground that the gove.nment had no factual basis for the question. Tr. at 4972-4974. Upon inquiry by the Court, government counsel indicated that the basis for these questions were certain notes[12] kept by a corporate officer of Allegheny Pepsi which suggested such a meeting. At a bench conference, the following colloquy occurred:

> THE COURT: They don't have to disclose what their basis is. But is the basis other than a note pad?
>
> MS. MCDONALD: No, Your Honor. I might add for the record that those notes were taken by a vice-president of the company. Or secretary of the company. An official secretary. Not — the vice-president.
>
> THE COURT: You're talking about the secretary of the company?
>
> MS. MCDONALD:That's correct, Your Honor.
>
> THE COURT: That makes a difference, I think. We're talking about corporate officer. I'm going to allow the cross-examination, and that's the end of it.

Tr. at 4976-4977. However, when the "corporate officer", Joan Nickel, testified, she indicated that at the time the notes were taken in November of 1983 she was not a corporate officer but rather only Lapides' personal secretary and assistant. Tr. at 6361. Ms. Nickel was, however, made a corporate vice-president some

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[12]Two entries from Lapides' secretary's note pad were relied upon. Exhibit 275 stated "Jim Hartford 4 p.m." Exhibit 276 states:

> Bay Field7 p.m.tonight
> —Jim *H*artford —
> Richmond—Suite @
> 804-285-8666 Hyatt *in* Tower—
> 8:30 p.m. arrival need key to go up
> Atlantic — call @ home before going to Bay Field to confirm
> 9 a.m. Friday back to Bay Field.

two months later in 1984. Tr. at 6189, 6361. Ms. Nickel testified that after becoming a vice president in 1984, she did not really asume any additional duties. She remained Lapides' secretary and assistant. Tr. at 6362.

Pursuant to the Court's ruling, the government counsel asked Lapides and Harford on cross-examination about this possible November 1983 meeting. Both denied the existence of any such meeting. Tr. at 4978, 6185.

During Lapides' cross-examination, the government attempted to establish the admissibility of Ms. Nickel's notes as a business record but were unsuccessful. During its rebuttal case, the government called Ms. Nickel to the stand and again attempted to lay a foundation for the admissibility of these notes. This too was unsuccessful. Ms. Nickel repeatedly testified that she had no idea what her notes meant or what was the source of the information contained in these entries. Ultimately, the Court ruled that Ms. Nickel's notes were inadmissible against Lapides and Harford. Tr. at 6518. Although the Court found that the notes were admissible against Allegheny Pepsi, they were determined to be cumulative and accordingly were not received into evidence. *Id.*

Lapides asserts that the government had absolutely no basis to suggest in its questioning that Lapides and Harford had met or planned to meet. Lapides argues that the government thereby failed to meet the requirement that "a prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove that fact." Lapides' Post-Trial Memorandum at 71 (quoting *United States v. Silverstein*, 737 F.2d 864, 868 (l0th Cir. 1984).

Silverstein involved a situation where the prosecutor asked the defendant questions that implied the existence of a fact whuich the prosecutor knew he could not support by evidence. The court of appeals stated that "a prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." *Id.*

However, witness impeachment or the introduction of inadmissible evidence under the guise of impeachment is not the issue involved here. The government attorney simply asked Lapides

and Harford about an underlying fact. The note entries made by Ms. Nickel indicated that a meeting between Lapides and Harford was perhaps scheduled. These notes provided an adequate factual basis for the government to pose questions to the defendants relating to such a meeting. *See United States v. Crosby*, 713 F.2d 1066, 1075 (5th Cir.), *cert. denied*, 464 U.S. 1001, 104 S. Ct. 506 (1983). Moreover, the government called Ms. Nickel to the stand to establish the good faith factual basis for these questions and to obtain the admission of her notes into evidence.

The Court therefore finds that government counsel's questioning of Lapides and Harford on cross-examination with regard to a possible meeting was proper under the circumstances and provides no basis for granting Lapides a new trial.

4. The Court's Statement Concerning Sheridan

On two occasions during this seven week trial, the Court stated that Sheridan was not on trial. Lapides and Harford[13] both assert that these statements usurped the jury's role of evaluating witnesses' credibility and require this Court to grant them new trials. Lapides' Post-Trial Memorandum at 47-48; Harford's Post-Trial Memorandum at 36.

In a federal jury trial, the judge is not merely a moderator, but rather:

> is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.... It is within his province ... to assist the jury ... by explaining and commenting on the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Quercia v. United States, 289 U.S. 466, 469 53 S. Ct. 698, 699 (1933).

Of course, any statements made by the judge respecting the evidence must be made with great care and should not distort the

[13]For ease of organization, this part of Harford's Rule 33 motion will be considered here along with Lapides' motion.

evidence or be misleading. *See* 289 U.S. at 470, 53 S. Ct. at 699. As the Fourth Circuit has stated, "the judge's comments must be neutral and not be given so as to intimidate the witness or otherwise interfere with the ascertainment of truth." *Anderson v. Warden, Maryland Penitentiary*, 696 F.2d 296, 299 (4th Cir. 1982) (en banc), *cert. denied*, 462 U.S. 1111, 103 S. Ct. 2463 (1983).

The first statement, made during the cross-examination of Sheridan, was an attempt to focus counsel's questioning and the jury's attention on the issues in the case — whether the defendants at trial were involved in the price-fixing conspiracy alleged in the indictment. The Court allowed the defendants wide parameters during cross-examination. Included in this crossexamination were vigorous challenges to Sheridan's credibility. However, when the cross-examination began to focus on whether Sheridan had attempted to destroy or conceal certain evidence and thereby obstruct justice, the Court sought to ensure that the focus of the proceedings remained on the defendants on trial and was not improperly shifted to one of the witnesses. Accordingly, the Court reminded both counsel and the jury that Sheridan was not on trial. Tr. at 1075. None of the defendants objected to this statement.

Forty days later, during jury instructions, the Court stated:

> If you believe that any witness has been impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.
>
> ...
>
> You should receive the testimony of an alleged co-conspirator, or an immunized witness, with great caution and weigh it carefully. The fact that a witness may have participated in the crime charged in the indictment or that he may have violated the law or pled guilty does not mean that he has not told the truth, but it is a factor to utilize in considering and weighing the testimony of that person.
>
> I emphasize that certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case.

Tr. at 7459-7461.

Three other times during the instructions the Court cautioned the jury that only the indicted defendants were on trial and that the jury should not speculate as to what happened to other people or to co-conspirators.

The two widely separated statements by the Court regarding the fact that Sheridan was not on trial, taken in the context in the first instance of a vigorous cross-examination and in the second of the overall instructions, did not undermine the fairness of the trial. These statements assisted the jury in understanding what role factors such as a witness testifying under immunity or the lack thereof, or of having participated in the conspiracy could play in their determination of a witness' credibility. These statements did not amount to a favorable endorsement of Sheridan's credibility. The Court allowed extensive cross-examination of Sheridan, including attacks on his credibility. The Court instructed the jury before and after the challenged statement that they were the sole judges of all witnesses' credibility. The Court's statements simply focused the jury's attention on the issues of the case. Moreover, the comments were accurate and balanced. Accordingly, the Court finds that its statements did not usurp the jury's function of evaluating the credibility of witnesses or otherwise prejudice the defendants. *See United States v. Gravely*, 840 F.2d 1156, 1164 (4th Cir. 1988); *United States v. Tello*, 707 F.2d 85 (4th Cir. 1983).

2. Defendant Hartford

The evidence of Harford's involvement in the conspiracy consists of testimonial and documentary evidence placing Harford at five different conspiratorial meetings with officers of Allegheny Pepsi. Additionally, evidence was presented that Harford participated in several telephone conversations with officers of Allegheny Pepsi with regard to the price-fixing conspiracy.

Pollino testified that he met with Harford during the Maryland Soft Drink Association Convention at Ocean City, Maryland in June of 1982. Tr. at 2042. Pollino testified that at this meeting, he and Harford agreed, on behalf of their respective companies, to fix soft drink prices and to instruct their respective sales people to strictly adhere to the promotional letter pricing that

both of their companies distributed. In other words, Pollino and Harford agreed to end deep discounting. *See* Tr. at 2048, 2098. Pollino further testified that he met with Harford again at the Colony 7 Restaurant between Baltimore and Washington on October 21, 1982, and discussed promotional letter pricing.[14] Tr. at 2113, 2120. Pollino testified that he again met with Harford in the Fox's Lair at the Richmond Hyatt on April 25, 1984, and discussed problems with the maintenance of the pricing agreement for the Norfolk area. Tr. at 2173-2175. At this meeting, Harford agreed to raise the promotional price of two liter bottles of Coke and Pollino agreed to raise the promotional price of 16-ounce non-returnable bottles of Pepsi in the Norfolk market. Tr. at 2174-2176. Harford and Pollino also discussed the personality conflicts between their respective division managers in Norfolk. Pollino suggested that to make sure that their agreement worked, perhaps he should contact the Mid-Atlantic Coke division manager directly. Tr. at 2178. Harford did not object to this suggestion, Tr. at 2178,2179, and a few days after this meeting, Pollino did meet with the Mid-Atlantic Coke manager. Tr. at 2180-2181.

Pollino and Sheridan both testified that they together met with Harford in the second half of 1983 or early 1984 at the Richmond Hyatt to discuss problems with deviations from promotional letter pricing. Tr. at 2155-2159, 502-505. Sheridan, Pollino, and Harford again agreed to adhere to their respective promotional letter prices and to ensure that their subordinates carried out this agreement.

Sheridan also testified that Harford set up a meeting with him at the Howard Johnson's in Cheverly, Maryland on September 21, 1983, to confirm that the introduction of Allegheny Pepsi's new cost-saving shrink wrap packaging would not upset the pricing agreement between Allegheny Pepsi and Mid-Atlantic Coke. Tr. at 511-512, 523-526.

In his defense, Harford offered evidence to establish his noninvolvement in the price-fixing conspiracy. Harford himself

[14]Although not completely meshing as to the date of this meeting, Robert Coursey, the Allegheny Pepsi sales manager for Baltimore, testified that Pollino had told him on one occassion that he was going to a meeting with Harford at the Colony 7 Restaurant. Tr. at 3054-3057.

testified that he met with Pollino three times concerning Pollino's desire to work for a Coca-Cola organization in the Northeast. Tr. at 4836, 4837, 4838-4839. This testimony was in accord with Pollino's testimony that he initiated each meeting that he had alone with Harford and that the general purpose of the Colony 7 meeting concerned Pollino's desire for employment with a Coca-Cola bottler. Harford testified further that he neither knew of nor was involved in any price-fixing agreement. Harford also testified that he was not involved in manging Mid-Atlantic Coke's promotional sales but rather focused his attention on the more significant chain-marketing accounts. For purposes of his post-trial motions, Harford also attacks the credibility of Pollino and Sheridan and highlights the inconsistencies between their testimony.

a. Harford's Rule 29 Motion

Although Harford raises substantial questions concerning the credibility of Pollino and Sheridan, the Court finds that these questions of credibility were amply presented to the jury and that they are not so overwhelming as to render the testimony of these witnesses incredible as a matter of law. Further, all of the defendants, including Harford, amply underscored the various conflicts in the evidence during trial. The jury has resolved these conflicts against Harford. Under Rule 29, this Court is not at liberty to evaluate these credibility and evidentiary questions anew. This Court will not upset the jury's verdict by such a re-evaluation.

Rather, this Court must determine whether, viewing the evidence most favorably to the government, the jury's verdict against Harford is supported by substantial evidence. *United States v. Steed*, 674 F.2d 284, 286 (4th Cir.) (en banc), *cert. denied*, 459 U.S. 829, 103 S. Ct. 67 (1982). As discussed above, the thrust of the substantial evidence test is whether the evidence could be accepted by a reasonably-minded jury as sufficient to support finding a defendant guilty beyond a reasonable doubt. *See United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979).

Pollino and Sheridan both testified from first-hand observation to Harford's direct involvement in the initiation and maintenance of the price-fixing agreement. The jury apparently found this testimony credible and believed it. As such, this testimony

alone could lead a reasonable mind to conclude that Harford was guilty beyond a reasonable doubt. Accordingly, the Court finds that the jury's verdict against Harford is supported by substantial evidence. Harford's Rule 29 motion is denied.

b. Harford's Rule 33 Motion

Harford's Rule 33 motion presents a closer question. However, as the Fourth Circuit noted in *Arrington* II, "the trial court's discretion [under Rule 33] should be exercised sparingly, and a new trial should be granted only when the evidence weighs heavily against the verdict. *Arrington* II, 757 F.2d at 1486 (citing 3 Wright, Federal Practice and Procedure § 353 (1982)).

The evidence against Harford did not define Harford's role in the conspiracy with the same particularity with which Lapides' role was shown. Unlike the evidence against Lapides, no witness who worked under Harford at Mid-Atlantic Coke testified that Harford directed his company's participation in the conspiracy. The only indication from any Mid-Atlantic employee that Harford was even aware of his company's participation in price-fixing was in the testimony of Bud Coe, Vice President of Mid-Atlantic's Baltimore division.

Coe testified that prior to a staff meeting attended by Harford, Coe jokingly said that he would give Pollino a call and see if they couldn't stop "wild" pricing in Virginia. Tr. at 1621. Coe testified that Harford responded: "Bud, you have to be careful in situations like that; you could get yourself and your company into a lot of difficulties; that if an employee that worked for me, for example, was terminated, he could go to the Justice Department and cause problems.'" Tr. at 1622. Whether this statement was intended to caution Coe against contacting Allgheny Pepsi concerning pricing, was intended to caution against even joking about such contacts, or was intended to instruct Coe to be careful in making such contacts cannot be determined. The jury, however, could have inferred from this and other evidence[15] that Harford

[15]Pollino testified that Harford instructed him to contact Terry Pemberton, the vice president of Mid-Atlantic Coke directly below Harford, rather than Harford when there were problems with deviations from agreed upon pricing. *See* Tr. at 2232-2235.

was more successful at insulating himself from the ongoing operation of the conspiracy than was Lapides.

As discussed above, Pollino and Sheridan testified that they participated in five meetings with Harford. Their testimony clearly indicated that Harford played a pivotal role in commencing, maintaining, and enforcing the price-fixing conspiracy. Additionally, the overwhelming evidence that Mid-Atlantic Coke participated in the agreement in its Baltimore, Richmond, and Norfolk divisions, each supervised by a different manager, is strong circumstantial evidence that Mid-Atlantic's participation was centrally directed. Together, this evidence inescapably leads to the conclusion that Harford actively participated in the conspiracy.

Harford vigorously argues that he has been found guilty only by virtue of his association with conspirators. However, the jury was specifically instructed that each defendant was to be considered separately and that "the fact that a defendant may have associated with other people who were guilty of price-fixing does not make that person guilty of price fixing...." Tr. at 7493. In light of this instruction and the ample evidence of Harford's personal involvement in the conspiracy, the Court cannot conclude that Harford was found guilty merely by virtue of his association with guilty persons.

Harford also attacks the evidence against him with a related, but distinct argument. Harford asserts that he should be granted a new trial because the verdict against him is tainted by the overwhelming focus during trial on evidence relevant solely to the unlawful activities of the other defendants and co-conspirators not on trial. Harford's Response to the Government's Post-Trial Memorandum [Harford's Response] at 2; Harford's Post-Trial Memorandum at 13. Although Harford cites severance cases to support his "rub off" or taint argument, he does not move for a new trial on the grounds that the Court failed to sever his trial from that of Lapides and Allegheny Pepsi, *see* Harford's Response at 2, but rather that the evidence against these defendants "rubbed off" on him.

The rub off that Harford argues entitles him to a new trial, however, is precisely the ill that severance prevents. Harford cannot now ask for the cure independently of the medicine.

Moreover, severance would not be appropriate in this case. The joinder of the defendants under one indictment alleging that each of them participated in a single, ongoing conspiracy was entirely proper. *See United States v. Ras*, 713 F.2d 311, 315 (7th Cir. 1983); *United States v. Hargrove*, 647 F.2d 411, 415 (4th Cir. 1981). Although the evidence of Lapides' and Allegheny Pepsi's guilt was perhaps greater than the evidence against Harford, this did not entitle Harford to a severance. *See Hargrove*, 647 F.2d at 415. The evidence of Harford's participation in the conspiracy was abundant and clear. There is no reason to believe that the jury was unable to consider the evidence pertaining to Harford independently of the evidence against Lapides and Allegheny Pepsi as instructed by the Court. *See* Tr. at 7490-7492.

The Court finds that the evidence relating to Harford in this case does not weigh heavily against the jury's guilty verdict and therefore declines to order a new trial upon this ground.[16]

B. Defendant Allegheny Pepsi

Allegheny Pepsi has moved for a new trial pursuant to Rule 33 based upon its assertion that the Court erred in charging the jury and in certain evidentiary rulings. Each of Allegheny's contentions will be considered below.

1. Challenges to Jury Instructions

Two complete days were devoted to consideration of the voluminous proposed instructions and objections presented by the government and the defendants culminating in a charge encompassing some 63 pages in the transcript. The challenges of Allegheny Pepsi focus on intent, scope and communications.

a. Instruction on Intent

Allegheny Pepsi argues that the Court erroneously rejected its Proposed Instruction No. 19 and that the instruction given by

[16]Harford's argument for a new trial based upon the Court's statements regarding Sheridan were considered and rejected above.

the Court on corporate intent was "clearly erroneous" in that it "misstated the law and did not fully inform the jury regarding the subjective intent that must be shown if an employee's acts are to be found to be within the scope of his employment and thus attributable to the corporation...."Allegheny's Post-Trial Memorandum at 4.

The instruction given by the Court on this point stated as follows:

> The law, therefore, holds a corporation criminally responsible for all unlawful acts of its directors, officers, employees, or other agents, provided such unlawful acts are done within the scope of their authority as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business while they were actively engaged in the management, direction, control, or transaction of its business or affairs.
>
> Authority to act for a corporation in a particular matter, or in a particular way or manner may be inferred from the surrounding facts and circumstances shown by the evidence in the case.
>
> That is to say, authority to act for a corporation, like any other fact in issue in a criminal case, need not be established by diret evidence, but may be established by circumstan[t]ial evidence.
>
> Every act of an agent on behalf of or in the name of a corporation, if done within the scope of the agent's authority, is, in law, the agent [stet] of the corporation itself.
>
> In order for a corporation to be responsible for the act or statements of an agent, it is not necessary that the corporation specifically authorize the agent to commit the act or make the statement.
>
> A corporation is legally bound by the acts and statements of its agents, done or within the scope of their express or apparent authority.

Express or apparent [stet] authority is that specifically given to an agent by his supervisor, in that the superior knowingly authorized, ordered, or consented to the participation either actively or passively.

Now, apparent authority is the authority which outsiders, that someone looking at the person, would normally assume that the act [stet] would have. Judging from the agent's position with the company and the circumstances surrounding his past conduct.

When the act of an agent is within the scope of his employment, or within the scope of his apparent authority, the corporation is held legally responsible for it, although it may be contrary to his actual instructions, and although it may be unlawful.

The existence of such instructions and policies, if any be shown by the evidence, may be considered by you in determining whether the agents in fact were acting to benefit the corporation.

If the act of the agent is done with a view to furthering the corporation's business, of doing something for the corporation, then the expectation of a hope of a benefit, whether direct or indirect, makes the act that of the corporation.

Even if the agent himself benefits.

The act of the agent is no less the act of the corporation if from such intended conduct, either no benefit occurs, a benefit is indiscernible, or for that matter, the result turns out to be adverse.

...

You may take into consideration, in judging the acts of the corporation, the acts of its highest officers and apply that as you would to any other fact to determine [when] they were acting on behalf of or within the scope of their authority or employment.

Tr. at 7481-85.

Allegheny Pepsi argues that the wording of this instruction was erroneous because the "jury could not have understood that, to find Allegheny guilty, they were required to find that the employees allegedly engaged in the conspiracy were doing so for the benefit of Allegheny...." Allegheny's Post-Trial Memorandum at 8. Allegheny Pepsi contends that for an act of a corporate employee to be within the scope of employment, "the employee must act with the specific intent to benefit the corporation." Allegheny's Post-Trial Memorandum at 5. Apparently construing this specific intent to benefit the corporation as one of the elements of corporate criminal responsibility, Allegheny argues that "[t]he Court failed to instruct the jury in an understandable manner that the government must prove that Allegheny's employees acted with the intent to benefit the company...." *Id.*

The Court does not read the law of this circuit as requiring the government to prove an officer or director of a corporation specifically intended to benefit the corporation before that officer's or director's criminal act may be imputed to the corporation. The law does require that the act be performed within the officer's or director's scope of employment. *See United States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399, 406 (4th Cir. 1985). In *Automated Medial Laboratories*, the court noted that determining whether agents of a corporation were acting within the scope of their employment includes a determination of whether the agents were acting, at least in part, with an intent to benefit the corporation. *Id.* at 406-407. *See United States v. Basic Construction Co.*, 711 F.2d 570, 573 (4th Cir.), *cert. denied*, 464 U.S. 956, 104 S. Ct. 371 (1983). The court went on to explain that the purpose of requiring at least some intent to benefit "is to insulate the corporation from criminal liability for actions of its agents which be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation." *Id.* at 407 (emphasis in original).

The instructions given to the jury in this case concerning the criminal responsibility of a corporation for the acts of its agents properly focused initially on scope of employment, namely, express and implied authority. The jury was then instructed that "[i]f the

act of the agent is done with a view of furthering the corporation's business, of doing something for the corporation, then the expectation of a hope of a benefit, whether direct or indirect, makes the act that of the corporation." Tr. at 7483. This Court believes that the intent to benefit the corporation language was properly placed within the context of the scope of employment instructions.[17]

This Court finds that the instruction given clearly and fairly stated the law. Allegheny Pepsi fails to distinguish between the elements of the offense and the "apparent authority" of corporate employees to act on behalf of the corporation. Apparent authority is what is perceived by those dealing with Allegheny Pepsi. Mid-Atlantic Coke dealt with the President of Allegheny Pepsi, Sheridan, with the Vice President of Sales, Pollino, and with vice presidents and division managers Gravely and Fabian. Not one person at Mid-Atlantic Coke felt that the employees of Allegheny Pepsi with whom they were dealing weren't meeting and speaking with them in order to fix the prices that Allegheny Pepsi and Mid-Atlantic Coke were charging their customers. In fact, the corporations fulfilled the agreement and fixed their prices. Lapides, the controlling shareholder and Chairman of the Board of Allegheny Pepsi was an active participant in the conspiracy. It is difficult to discern any merit in this contention by Allegheny Pepsi. Even if the Court's instructions regarding criminal liability of a corporation for the acts of its officers and directors did not convey the proper relationship between an agent's scope of employment and intent to benefit the corporation, the Court could not find that in the context of this case, any such error prejudiced Allegheny Pepsi.

It is also beyond doubt that the officers, directors, and employees of Allegheny Pepsi intended to benefit the company with their price-fixing activities. Undeniably, some of the indi-

[17]The intent instruction proposed by Allegheny Pepsi was not given. This instruction stated that an employee "must act with an intent to benefit the corporation before the corporation can be held legally responsible for his acts." Allegheny Proposed Instruction No. 19. The Court gave an instruction conveying this point. Allegheny is not entitled to a new trial simply because the Court did not give the exact instruction proposed. *See United States v. Rubia*, 834 F.2d 442, 447 (5th Cir. 1987); *United States v. Harrelson*, 705 F.2d 733, 736-37 (5th Cir. 1983).

vidual involved also sought to benefit themselves personally. The conspiracy, however, was not an agreement on the side between individuals attempting to line their pockets. Rather, it was an agreement that fundamentally effected the way Allegheny Pepsi conducted business.[18] In this context, any defect in the Court's instructions to the jury regarding intent to benefit the corporation did not prejudice Allegheny Pepsi. Accordingly, the Court declines to grant Allegheny a new trial based on these grounds.

b. Instruction Regarding a Single Conspiracy

Allegheny Pepsi next challenges the Court's instruction concerning the government's burden of proving the single conspiracy charged in the indictment. On this point, the Court instructed the jury as follows:

> Now, this is a single overall conspiracy which is alleged in the indictment.This overall conspiracy must be proven. This is not to say that the prices, or types of products must be proven to be the same in Baltimore, Norfolk and Richmond; but there must be proven that there was one agreement to set prices, with three markets to set them in.

[18]In one incident, the Richmond branch manager agreed to a one time only delivery of six pack Pepsi cans at an earlier promotional price when an account complained that Allegheny Pepsi had failed to provide it with sufficient notice of the price increase. Tr. at 2939-2942. Allegheny had raised the promotional price of six pack cans $ .50 a case shortly before this incident. This price increase was pursuant to a pricing agreement that had been reached at a meeting between Pollino, Gravely, and Fabian from Allegheny Pepsi, and Randy Allen, MidAtlantic Coke's division manager for the Richmond and Norfolk areas. Tr. at 3339, 3341-3342, 3385-3386, 2938-2939. When Gravely, the Richmond division manager, was told of the branch manager's approval of the delivery, he presented the manager with three options: charge the account the difference between the new and the previous price; take the difference out of the route salesperson's pay; or have the difference taken out of his own pay. Tr. at 2944. The branch manager testified that Gravely told him that normally he (Gravely) would not take such a hard line on this action, but that he did not want Richmond to be the division "to screw up [Pollino's] program with Coke." *Id.* The branch manager elected to have the difference deducted from his own pay. Tr. at 2945-2946. Gravely signed an Allegheny Pepsi payroll adjustment form deducting $220 from the branch manager's pay. Tr. at 2950; Govt. Exh. No. 70.

> If you believe from the evidence that there was an independent, isolated agreement to fix or adhere to promotional prices between employees of Pepsi and Coke, in Norfolk, which was not made pursuant to a single overall agreement alleged in the indictment to fix prices, or adhere to promotional letters, then that's not the crime charged in the indictment.
>
> If you believe from the evidence that there was an independent, isolated agreement to fix prices, or adhere to promotional letters between Pepsi and Coke employees in Richmond which was not made pursuant to the single overall agreement alleged in the indictment, then that is not the crime charged in the indictment.
>
> If you believe from the evidence that there was an independent, isolated agreement to fix prices or adhere to promotional letters by Pepsi and Coke employees in Baltimore, which was not made pursuant to a single overall conspiracy alleged in the indictment, then that is not the crime alleged in the indictment.
>
> However, if you find beyond a reasonable doubt that there was a single overall conspiracy to fix prices or adhere to promotional letter pricing, then it makes no difference if the agreement was only shown to have occurred in Norfolk, or Baltimore, or Richmond, in any one of these divisions, so long as some part of the offense—something was done in the Eastern District of Virginia.

Tr. at 7487-88.

Allegheny Pepsi asserts that this instruction is an inaccurate and incomplete statement of the government's obligation because it does not adequately inform the jury of the distinction between single and multiple conspiracies. Allegheny argues that because of the instruction given by the Court, "[t]he jury . . . was led to believe that any connection or common element between the agreements in the various markets, such as Jerry Pollino's involvement in all three, would satisfy the government's requirement of

proving that the agreements in the seperate markets were not 'independent' and 'isolated,' but somehow amounted to a single, overall agreement." Allegheny's Post-Trial Memorandum at 11-12.

Allegheny Pepsi's conclusion as to the effect of the Court's instruction flies in the face of its plain language. This instruction unambiguously stated that a single, overall conspiracy was alleged in the indictment. This instruction stated that a single agreement to set prices in Baltimore, Richmond, and Norfolk must be proven. The instruction went on to state that if the jury believed that any agreements to set prices in Baltimore, Richmond, or Norfolk were independent, isolated agreements, then the conspiracy alleged in the indictment was not proven. This instruction did not suggest to the jury that common elements running through any price-fixing activity in these three markets established that there was a single, overall agreement. This instruction related to *what* had to be proven in order for the jury to convict Allegheny Pepsi, not *how* it could be proven.

Moreover, it is doubtful that the Court was required to give any instruction at all on Allegheny Pepsi's multiple independent conspiracies defense. Indeed, the jury could have properly convicted Allegheny for a conspiracy narrower in scope then the conspiracy charged in the indictment.*See United States v. Miller*, 471 U.S. 130, 105 S. Ct. 1811 (1985). The Court did, however, give an instruction on Allegheny's multiple conspiracy defense.This instruction clearly and unambiguously informed the jury of the basis of Allegheny's asserted defense. Accordingly, the Court finds that Allegheny Pepsi's challenge to the Court's single conspiracy instruction is without merit.

c. Businessmen Communication Instruction

Allegheny Pepsi also requested the Court to instruct the jury that "[i]t is not illegal for [businessmen] to meet and divulge their plans, including the prices they intend to charge for their products."Allegheny Proposed Instruction No. 26. The Court declined to give this instruction because it is misleading and carries implications inconsistent with the law.

The Court did give the jury the following instruction:

> "It is not illegal for businessmen to meet and discuss mutual problems. It is not illegal for them to exchange ideas, whether it be over a cup of coffee or at a social event, or at a business meeting. It is illegal for them to agree on a course of action that is designed and intended to unreasonably restrain trade. That is, to fix or stabilize prices on goods flowing in interstate commerce, or substantially affecting interstate commerce.

Tr. at 7473.

Although the exchange of pricing information is not *per se* a violation of the Sherman Act, such exchanges are looked upon with considerable suspicion. When the exchange of pricing information has the effect of fixing, raising, maintaining, or stabilizing prices, it is illegal. *Greenshaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1030-1031 (5th Cir. 1983), *rev'd in part on grounds not relevant, International Woodworkers v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986), *see United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16, 457, 98 S. Ct. 2864, 2875 n. 16, 2883-2884 (1978). Because such exchanges of current or future pricing information may or may not be illegal, depending on the anticompetitive effects and other factors, it would have been misleading and inaccurate to instruct unequivocably that such exchanges are not illegal. *See United States v. American Linseed Oil Co.*, 262 U.S. 371, 43 S. Ct. 607 (1923). The Court instructed the jury on the elements of the offense charged in the indictment and that the government must prove each element beyond a reasonable doubt. Accordingly, the Court finds that Allegheny Pepsi's Proposed Instruction No. 26 was properly refused.

2. Evidentiary Rulings

a. Excluded Expert Testimony

At trial, Allegheny Pepsi attempted to elicit expert testimony from a witness, Robert C. Mulligan. However, Allegheny failed to notify the government of the identity of this expert and to produce his expert witness materials 21 days prior to trial in accordance with a pretrial stipulation and order.

Mulligan, Allegheny Pepsi's budget director, was allowed to testify regarding the preparation of Allegheny's budget and operating statements; how these documents were used and what information they contained. Tr. at 5169-5183, 5415-5438. Mulligan had also computed and formed an opinion as to net trade sales, promotional expenditures per trade case, promotional expenditures as a percentage of trade sales, average sales price after promotions, and pretax profit per trade case by making certain calculations and extrapolations from the figures on the operating statements. This trade case data was not a mere summary of information contained in operating statements but were interpretations requiring lengthy and complicated calculations based in part upon judgments and decisions of the expert regarding methods of prorating and allocating certain cost figures. Tr. at 5387-5397. The witness testified that it had taken him from eight to eleven hours to make these calculations. Tr. at 5224. Moreover, the calculations were made for the purpose of use at trial. Tr. at 5223-5227. It appears that Allegheny Pepsi would say to the Court that the government can cross-examine after it finds out what figures the witness used and then employ an expert to make their own determination. If it takes a certified public accountant eight to eleven hours to calculate a matter, then it is difficult to argue with sincerity that the matter is not within expertise.

Despite these calculations that Mulligan performed in preperation to testify, Allegheny Pepsi nevertheless claims that the witness was asked to "merely recall how he assisted in the preparation of the operational statements and to explain what was contained in them[,] . . . to testify about factual information of which he had first hand knowledge, information which he obtained in the regular course of his duties during the relevant time period." Allegheny's Post-Trial Memorandum at 19. This assertion is simply not supported by the record.

As noted above, the precluded testimony related to extensive calculations made by Mulligan from Allegheny Pepsi's operating statements during a several hour session in preparation for trial. The Court allowed Mulligan to testify regarding matters actually reflected in the operating statements or from his personal

knowledge. (Tr. at 5334, "Well, he can testify from the financials that he prepared"; Tr. 5336, "well, all you have to do is to take the basic underlying document, and you show me where the trade sales are that you have utilized in this particular document"; Tr. at 5338, "And, frankly, I am going to tell you that Mr. Mullian can testify to any figure on that page that he can point to and say, that's a figure on the page"; Tr. at 5343, "He could testify to any budgets, anything that was in the past. I'm not stopping him from that. But that wasn't the purpose of bringing him here, Mr. Walsh.").

Mulligan's calculations, however, required accounting expertise and were prepared for trial. Clearly, under Federal Rule of Evidence 702, testimony derived from such calculations and requiring skill and expertise is expert testimony. Allegheny Pepsi attempted to put before the jury Mulligan's interpretations of data, based upon several hours of calculation, without the government being afforded a fair chance to cross-examine him. Indeed, the government could not have had an opportunity to effectively cross-examine the witness without first having their own expert review and analyze the complicated calculations and evaluate the judgments made regarding proration which were relied upon by the witness. In short, Allegheny Pepsi attempted to avoid its obligations under the pretrial stipulation and order by simply pretending that its expert was not an expert.

Moreover, Allegheny Pepsi now misrepresents Mulligan's testimony as relating solely to information which the witness obtained in the course of his duties during the relevant time period. This misrepresentation is as unwarranted as was Allegheny Pepsi's violation of the pretrial stipulation and order regarding expert testimony. Allegheny Pepsi certainly states no basis here for granting a new trial.[19]

[19]Allegheny Pepsi also claims that the Court interrupted its examination of Mulligan and concludes that the jury "could not possibly have understood" Mulligan's testimony. Without doubt, the Court may interrupt the examination of a witness when counsel repeatedly attempts to introduce expert testimony in violation of a pretrial stipulation and order as well as the Court's rulings from the bench.

b. Limitation of the Testimony of Harry J. Conn

Allegheny Pepsi lastly asserts that the Court erred when it prevented Harry J. Conn from testifying a third time regarding whether Allegheny Pepsi's promotional expenditures were increasing during the time of the conspiracy. On May 4, 1988, Conn testified that during the time he attended statement review meetings the Allegheny Pepsi promotional discount dollars were increasing. The testimony was stated as follows:

> Q. And can you tell me what reports were being rendered at statement review meetings about the competitive situations facing Allegheny Pepsi in the marketplace?
>
> A. Yes. While our sales were increasing somewhat, the promotional dollars that we were spending were increasing —
>
> THE COURT: You mean promotional discounts, Mr. Conn?
>
> A. Yes. Discount dollars.

Later the same day, Allegheny Pepsi's counsel again asked Conn about promotional dollar increases. Although Allegheny Pepsi counsel was apparently satisfied with the answer, the transcript of the proceedings indicated that the witness' second response was that promotional dollars were decreasing rather than increasing. Tr. at 5257. Allegheny Pepsi counsel did not and does not now know whether this different answer is a transcription error or whether the witness misunderstood the question. Tr. at 5496; Allegheny's Post-Trial Memorandum at 23.

On the following day, May 5, 1988, Allegheny attempted to resolve this ambiguity in the transcript by asking Conn about promotional dollar increases a third time. However, this third inquiry was blatantly leading and referred specifically to Conn's previous answer. *See* Tr. at 5493. The Court directed Allegheny Pepsi counsel not to lead the witness. The Court stated further that:

> If it was a transcription error, why didn't you bring it up like the other transcription errors were brought up. That is, this is obviously a mistake, a transcription error, it was obviously an error, and everybody agreed to it. Instead of doing that, you come in here with a leading question, after I have admonished you time and time and time again not to ask leading questions.
>
> I told you last time that I was going to stop you from questioning the witness if you didn't stop leading....

Tr. at 5496.

The Court then ruled that the question had already been asked and answered. Tr. at 5497. If the witness had misunderstood the question, the Court ruled that counsel should have corrected such ambiguity when it occurred. If the error was merely a transcription error, then any error is harmless. This evidentiary ruling falls within the discretion of the Court and was necessary in light of Allegheny counsel's refusal to properly question its witness.

Moreover, in this seven week trial, Allegheny Pepsi repeatedly presented evidence that promotional expenditures were increasing during the time of the conspiracy. Witnesses Mulligan, Staley, Sheridan, Fabian, and Conn all so testified. The government did not introduce evidence to the contrary and made no such argument to the jury. This Court discussed this matter in an attempt to consider all of the points raised by Allegheny Pepsi even though the Court is convinced that this argument does not merit any discussion.

For the foregoing reasons, defendants Lapides', Harford's and Allegheny Pepsi's motions are DENIED.

The Clerk is DIRECTED to forward a copy of this order to all counsel of record.

IT IS SO ORDERED.

/S/Robert G. Daumar
UNITED STATES DISTRICT JUDGE

At Norfolk, Virginia
September 19, 1988

Date of Entry: September 19, 1988

Appendix C

Judgment
United States Court of Appeals
for the Fourth Circuit

No. 88-5139

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

James J. Harford,
Defendant - Appellant

Washington Legal Foundation
Amicus Curiae

No. 88-5140

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

Morton M. Lapides,
Defendant - Appellant

Washington Legal Foundation
Amicus Curiae

No. 88-5146

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

Allegheny Bottling Company
Defendant - Appellant

No. 88-5147

Pepsico Inc.

Appellant

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

Allegheny Bottling Company

Defendant

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgement of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed as to all convictions. The case is remanded to the United States District Court for Eastern District of Virginia at Norfolk to correct the sentence of Allegheny Bottling Company.

/s/John M. GRAECEN

Date of Entry: January 11, 1989

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5140

United States of America

Plaintiff - Appellee

versus

Morton M. Lapides

Defendant - Appellant

Washington Legal Foundation

Amicus Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc.

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearfng in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Ervin and Judge Phillips.

For the Court,

/s/JOHN M. GREACEN
CLERK

Date of Entry: April 7, 1989

Appendix E

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a ~~G~~rand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix F

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding provision shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690,Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Appendix G

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

Appendix H

§ 1291. Final decisions of district courts

The courts of appeals. shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85 508, § 12(e), 72 Stat 348

Appendix I

Rule 29. Motion for Judgment of Acquittal

(a) **Motion Before Submission to Jury**. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) **Reservation of Decision on Motion**. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.

(c) **Motion After Discharge of Jury**. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

(d) **Same: Conditional Ruling on Grant of Motion**. If a motion for judgment of acquittal after verdict of guilty under this Rule is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed, specifying the grounds for such determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial has been granted conditionally and

the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. If such motion has been denied conditionally, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 10, 1986, Pub.L. 99-646, § 54(a), 100 Stat. 3607.)

Appendix J

—27.5. Motions for summary dispositions. Motions for summary disposition or reversal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.

Motions for summary disposition should be made only after briefs are filed. If such motions are submitted before the completion of the briefing schedule, the Court will defer action on the motion until the case is mature for full consideration.

Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed anytime. The Court may also sua sponte summarily dispose of any appeal anytime.

Appendix K

—36.4. Unpublished dispositions. Unpublished opinions give counsel, the parties and the lower court or agency a statement of the reasons for the decision. They may not recite all the facts or background of the case and may simply adopt the reasoning of the lower court. They are sent only to the trial court or agency in which the case originated, to counsel, and to individuals and institutions on a subscription list maintained by the Clerk. Any individual or institution may receive copies of all published and unpublished opinions of the Court by paying an annual subscription fee for this service. In addition, copies of all published and unpublished opinions are sent to all circuit judges, district judges, bankruptcy judges, magistrates, clerks of district court, United State Attorneys and Federal Defenders upon request. The Federal Reporter periodically lists the result in all cases involving unpublished opinions. Copies of any unpublished opinion are retained in the file of the case in the Clerk's Office and a copy may be obtained from the Clerk's Office for $2.00.

[Amended 12-4-85.]

Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.

(2)

No. 88-1988

Supreme Court, U.S.
FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MORTON M. LAPIDES, PETITIONER

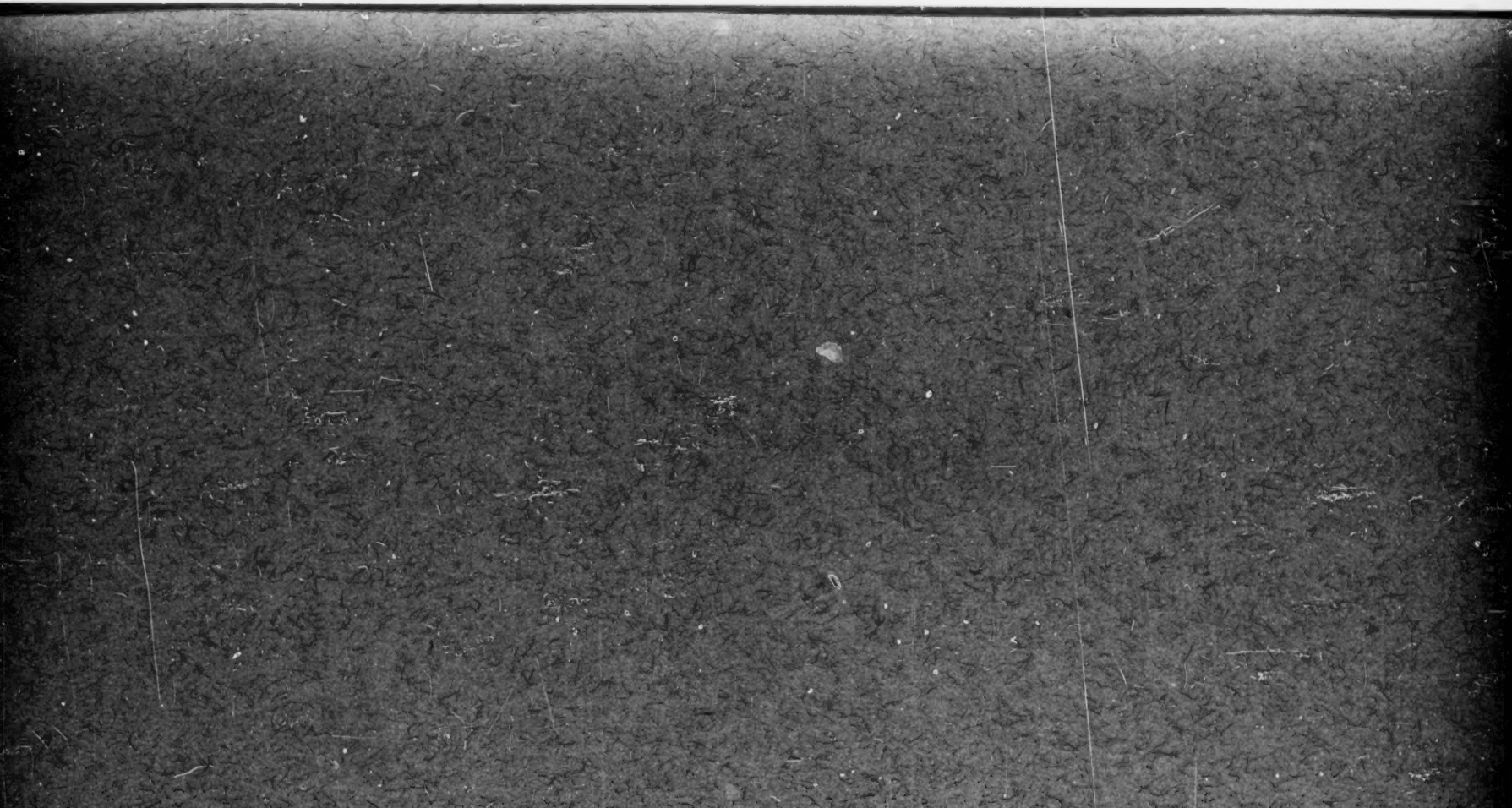
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
JUDY L. WHALLEY
Acting Assistant Attorney General
JOHN J. POWERS, III
ANDREA LIMMER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTIONS PRESENTED

1. Whether a court of appeals may affirm a conviction in an unpublished per curiam opinion that does not discuss in detail all of the contentions raised on appeal.

2. Whether there was sufficient evidence to support petitioner's conviction.

3. Whether the trial court improperly commented on the credibility of a government witness.

4. Whether petitioner was improperly convicted on a vicarious liability theory.

5. Whether the government suppressed exculpatory evidence at trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1988

MORTON M. LAPIDES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unreported, but the decision is noted at 870 F.2d 656 (Table). The opinion of the district court (Pet. App. 9a-49a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1989. A petition for rehearing was denied on April 7, 1989. The petition for a writ of certiorari was filed on June 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 14, 1987, a grand jury sitting in the Eastern District of Virginia returned a one-count indictment against the Allegheny Bottling Company (Pepsi) and three individuals: James Harford, Odis Allen, and petitioner Morton Lapides. The indictment charged that the defendants had conspired to fix prices for soft drinks sold by Pepsi and its chief competitor, Mid-Atlantic Coca-Cola Bottling Company, Inc. (Coke) between 1982 and 1985, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Allen, a regional manager of Coke, pleaded guilty. The remaining defendants were convicted following a seven-week jury trial. Petitioner, the chairman of Pepsi, was fined $100,000 and was sentenced to three years' imprisonment, all but 179 days of which were suspended on the condition that he perform three years of community service.[1] The court of appeals affirmed the convictions, but modified the sentence of co-defendant Pepsi.

1. The trial evidence showed that officers of Pepsi and Coke met between 1982 and 1985 and agreed to adhere to the prices published in their promotional letters. This

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[1] Petitioner has since completed his sentence of imprisonment. In a separate action, petitioner sought a stay of his community service obligation pending the disposition of his certiorari petition in this case. The district court denied a stay, and the court of appeals denied a stay pending appeal.

agreement in effect set the price for Coke and Pepsi in the Mid-Atlantic region covering Baltimore, Norfolk, and Richmond. Pet. App. 4a-5a, 11a-12a.

Petitioner launched the conspiracy in 1982. He directed his vice-president in charge of sales, Jerry Pollino, to meet with Coke president James Harford at an upcoming soft drink convention in Ocean City, Maryland, to advise him that Coke had been discounting its products too heavily and that the practice should stop. Pet. App. 6a, 15a. Pollino and Harford, who had previously worked together at Canada Dry, met and agreed to stop the discounting by adhering to the prices published in their promotional letters. *Id.* at 5a, 16a. Thereafter, Pollino, Sheridan, and Harford met periodically to reaffirm their commitment to the price-fixing agreement, and their regional managers carried out the conspiracy at the local levels. *Id.* at 5a, 12a-13a.

Several officers and employees of Pepsi and Coke admitted that they participated in the conspiracy. Pet. App. 5a. Pollino kept Sheridan informed of the progress of the conspiracy in the various regions; Sheridan, in turn, kept petitioner informed. *Id.* at 6a, 16a. Petitioner directed Sheridan to be sure that the agreement was kept in force. *Id.* at 17a.

2. The court of appeals expedited the appeal because petitioner was denied bail pending appeal.[2] A month after hearing oral argument, the court unanimously affirmed the convictions of petitioner and his co-defendants. In a per curiam opinion, the court discussed the evidence supporting the charges and explained its reasons for rejecting the nu-

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[2] The district court held that petitioner had not met his burden under 18 U.S.C. 3143 of establishing that he was not likely to flee the country while the appeal was pending. The court of appeals affirmed the denial of bail.

merous claims raised by the appellants. Among other things, the court found that "a convincing case of price fixing was presented by the prosecution and believed by the jury," Pet. App. 5a, and that petitioner had initiated the conspiracy, *id.* at 6a. The court expressly rejected petitioner's contention that he had been convicted on a theory of "vicarious liability"; rather, the court found that the evidence was sufficient to convict petitioner for "what he did, what he said, and the orders he gave his employees in furtherance of the conspiracy." *Ibid.* Finally, the court concluded that there was no evidence to support petitioner's "claim of bias or improper conduct on the part of the trial judge" and that the jury had been properly instructed. *Id.* at 7a.

ARGUMENT

1. Petitioner first claims that it was improper for the court of appeals to affirm his conviction in an unpublished per curiam opinion. He asks this Court to grant review to establish uniform standards (the content of which petitioner does not suggest) governing the issuance of published opinions. Pet. 10. That claim supplies no basis for reviewing, much less reversing, the judgment below.

The right to appeal provided a defendant by 28 U.S.C. 1291 entitles him to an independent review of the district court's judgment by the court of appeals. Petitioner received precisely that. The right to an appeal does not also encompass the right to an opinion treating each of the defendant's claims separately and in detail. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983). See also *United States* v. *Baynes*, 548

F.2d 481 (3d Cir. 1977); *NLRB* v. *Amalgamated Clothing Workers, Local 990*, 430 F.2d 966, 971 (5th Cir. 1970). Requiring the courts of appeals to publish an opinion in every case would impose a significant and needless burden on the courts and the profession, especially because (as petitioner's appeal illustrates) many appeals are frivolous or have little merit, involve nothing more than the application of settled law to the facts, or follow an opinion by the district court fully addressing the issues raised on appeal. Moreover, issuing an unpublished opinion does not allow the circuits to avoid "accountability" (Pet. 8), because a defendant has the opportunity to develop the issues raised before the court of appeals in a petition for a writ of certiorari, and this Court can decide based on that petition whether review is warranted. *E.g.*, *Green* v. *Bock Laundry Machine Co.*, 109 S. Ct. 1981 (1989). For those reasons, this Court has recognized that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions." *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972).

Finally, the court of appeals did not treat petitioner's appeal "summarily," as he claims. Pet. 5 n.4. The court acted expeditiously to decide the appeal because petitioner had been denied bail, but the court had the benefit of full briefing and argument before issuing its decision, a 10-page opinion discussing in appropriate detail the evidence against the defendants and the principal issues raised.[3]

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[3] The case was argued on December 6, 1988, and the court of appeals issued its opinion on January 11, 1989. The defendants had been permitted to file one joint brief raising about a dozen issues for appeal, and the three individual defendants were permitted to file separate briefs that raised a dozen more issues. The court also permitted two additional parties to file briefs addressing an issue regarding corporate sentencing. The court of appeals' opinion addressed practically every

2. Petitioner's claim that the evidence was insufficient to support his conviction (Pet. 10-12) does not warrant review by this Court. See *Hamling* v. *United States*, 418 U.S. 87, 124 (1974) ("The primary responsibility for reviewing the sufficiency of the evidence to support a criminal conviction rests with the Court of Appeals."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); accord *Superintendent* v. *Hill*, 472 U.S. 445, 460-461 (1985) (Stevens, J., concurring in part and dissenting in part). In any event, petitioner's contention is based on the erroneous assertion that his conviction rested on the "contradictory" testimony of two government witnesses on a "pivotal factual issue." Pet. 10. In fact, the government's two principal witnesses, Pepsi president James Sheridan and Pepsi vice-president Jerry Pollino, both implicated petitioner in the price-fixing conspiracy. Sheridan and Pollino, who were subordinates of petitioner, testified that petitioner knew in 1982 that Pollino was going to meet with Coke's President James Harford at an upcoming Ocean City convention to discuss pricing. Pet. App. 15a-16a; C.A. App. 919-920 (Sheridan), 2527-2531, 2567, 2569 (Pollino). Both Sheridan and Pollino testified – as did several other Coke and Pepsi employees – that this initial meeting was followed by other price-fixing meetings and discussions over the next two years. Pet. App. 16a, 32a-33a. Both Sheridan and Pollino testified that petitioner knew about the conspiracy. Pet. App. 15a-16a; C.A. App. 958, 1005-1006,

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issue raised, and, in any event, there is no rule of law that requires a court of appeals to note and address each separate issue raised by an appellant regardless of its merit.

1056 (Sheridan), 2566-2567, 3366-3368 (Pollino).[4] Finally, Pollino did not contradict Sheridan's testimony that petitioner was regularly informed of the progress of the conspiracy and directed Sheridan to make sure that Pepsi and Coke adhered to their agreement. Pet. App. 16a-17a. Unlike Sheridan, Pollino did not deal directly with petitioner on a daily basis and therefore was not in a position to know the details of the manner in which petitioner kept track of the activities of the other conspirators. Thus, even if petitioner were correct in suggesting that a conviction cannot stand where two different government witnesses present contradictory evidence on the issue of defendant's guilt – a proposition that does not have support in the cases petitioner cites (Pet. 11)[5] – that proposition would have no relevance to this case.

3. The fact that the trial judge on two occasions stated that James Sheridan was "not on trial here" does not warrant review by this Court.[6]

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[4] Sheridan testified that petitioner initiated the conspiracy by directing Sheridan to have Pollino meet with Harford. C.A. App. 923. Pollino testified that Sheridan told him to meet with Harford, but Pollino conceded that he did not know from whom that suggestion originated. C.A. App. 3005-3006; see Pet. App. 15a & n.5, 16a. Their testimony on that point is therefore not contradictory, but even if it were, the issue is not critical to establishing petitioner's guilt. Petitioner was guilty of price-fixing whether or not he initiated the first price-fixing meeting, because Pollino as well as Sheridan testified that petitioner knowingly endorsed it. *E.g.*, C.A. App. 2532 (Pollino).

[5] The cases on which petitioner relies involve equivocal testimony by a single witness on a material fact. In this case, by contrast, Sheridan's testimony was not equivocal or internally inconsistent. Moreover, Pollino's testimony corroborates Sheridan's testimony on all the essential facts necessary to prove petitioner's involvement in the conspiracy.

[6] As noted above, petitioner's claim that Sheridan was the "only" witness against petitioner (Pet. 12) is incorrect. Pollino directly impli-

The court first made that comment during the defense cross-examination of Sheridan, and defense counsel did not object to the comment. C.A. App. 1552. Because the comment was not plain error, Fed. R. Crim. P. 52, petitioner cannot now raise it as a ground for reversal.[7] Forty days later, at the close of trial, the court charged the jury that the testimony of immunized witnesses should be received "with great caution and weigh[ed] carefully." C.A. App. 7936. The court then stated that "certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case." *Ibid.* Immediately after making that comment, the court emphasized that "it is only a comment. You may disregard this comment entirely." C.A. App. 7936-7937; see also *id.* at 7924, 7925. The court further stated that its opinion as to the facts did not "count in any way in this case," C.A. App. 7926, and that the jurors "are the sole judges of the credibility or believability of the witnesses." C.A. App. 7931. Under these circumstances, the court's comments were within its discretion to comment on the evidence, see

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cated petitioner in the conspiracy as well.

[7] The comment was made after Sheridan repeatedly was asked on cross-examination whether he had destroyed documents and obstructed justice (C.A. App. 1180-1184, 1549-1551) -- a crime with which Sheridan (who had pleaded guilty to the conspiracy) had never been charged. To ensure that the focus of the proceeding remained on the central issues of the case and was not unduly weighted with collateral matters, the court correctly commented that Sheridan "is not on trial here." C.A. App. 1552; see Pet. App. 31a. Even then, the court permitted the defendants to ask Sheridan twice again, in continued efforts to impeach him, whether he had destroyed documents. C.A. App. 1559-1563, 1815-1816. (No evidence that Sheridan had destroyed documents was ever presented.)

Quercia v. *United States*, 289 U.S. 466, 469 (1933), and did not prejudice petitioner.[8]

4. Petitioner's claim (Pet. 14-17) that he was improperly convicted on a "vicarious liability" theory rests on a mischaracterization of the record and was properly rejected by the court of appeals as having no merit. Pet. App. 6a; see also *id.* at 23a-25a. In the first place, the government correctly argued to the jury that petitioner joined the conspiracy by directing Pollino to meet with Harford to fix prices, by authorizing, encouraging, and condoning his subordinates' price-fixing activities, and by failing to take action to stop the price-fixing when he clearly had the power to do so. C.A. App. 7556; see Pet. App. 25a. The government did not argue, as petitioner suggests, that petitioner "could be convicted if he knew that price fixing activities were going on and failed to put a stop to them." Pet. 15. But even if the government's argument were improper, it would not supply a basis for reversal, because the trial court instructed the jury that its charge, not the arguments

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[8] The cases cited by petitioner (Pet. 13-14) are not to the contrary. In *Quercia*, 289 U.S. at 468, 472, the court told the jury as a "definite and concrete assertion of fact" that wiping one's hands while testifying as defendant had "is almost always an indication of lying," and the court added that "every single word that man said, except when he agreed with the Government's testimony, was a lie." In *United States* v. *Safley*, 408 F.2d 603, 605 (4th Cir.), cert. denied, 395 U.S. 983 (1969), the court criticized (but found no plain error in) a charge that witnesses "are presumed to speak the truth," because the court believed that the charge diluted the presumption of innocence where the defendant did not testify. In *United States* v. *Dunmore*, 446 F.2d 1214, 1219 (8th Cir. 1971), cert. denied, 404 U.S. 1041 (1972), the court told the jury, inter alia, that the only government witness implicating the defendant "told his story right straight out, answered the questions that were asked him without hesitation, without pulling any punches * * *." The court of appeals found that this statement "came dangerously close to directing a verdict against [the defendant]." *Ibid.*

of counsel, must govern the jury's deliberations. C.A. App. 7923. The court properly charged that "[a]n individual is not held responsible on the basis of an act or omission of * * * a subordinate, unless you are convinced beyond a reasonable doubt that such defendant willfully ordered, directed, or authorized the act." Pet. App. 24a. That instruction prevented petitioner from being convicted merely because he knew of price-fixing activities by others.[9] The record citations offered by petitioner to support his claim that the government argued for "vicarious liability" (Pet. 14) are to arguments of petitioner's own counsel to the court (C.A. App. 8809), not the argument of government counsel to the jury, and to a requested jury instruction (C.A. App. 187) that was never given.

5. Petitioner incorrectly claims (Pet. 17-23) that the prosecution withheld exculpatory information from him that would have cast doubt on the credibility of government witnesses. The defendants knew well before trial that James Sheridan had told the government that the initial conspiratorial meeting between Pollino and Harford in Ocean City occurred in June 1983.[10] Shortly before trial began, however, Sheridan realized that he had incorrectly dated the Ocean City meeting, and that in fact the meeting had occurred a year earlier, in June 1982. Sheridan realized his error when he reviewed a document, Trial Exhibit H-1, that the defendants had not previously turned over to the

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[9] Because the court's jury instructions precluded a conviction on a theory of "vicarious liability," petitioner's reliance on *Stirone* v. *United States*, 361 U.S. 212 (1960) (Pet. 15), is misplaced.

[10] The defendants knew that Harford's business records showed that he was in another city at the time of the June 1983 Ocean City convention and that, although it was not impossible for Harford to have gone to Ocean City for part of the convention, Sheridan's recollection was probably faulty. Compare Pet. 19.

government. Pet. App. 26a.[11] The government disclosed Sheridan's change in recollection in its opening statement on the first day of trial and questioned Sheridan about it on direct examination. C.A. App. 764, 953-954. On cross-examination, the defendants extensively and aggressively questioned Sheridan about his reasons for placing the Ocean City meeting in 1982 rather than 1983. The defendants never requested a continuance to investigate the matter further. Pet. App. 27a; C.A. App. 1185-1187, 1214-1224, 1308-1309, 1632-1647.[12] Thus, petitioner was aware at the outset of the trial that Sheridan had testified to two different dates for the Ocean City meeting; petitioner effectively cross-examined Sheridan concerning his changed recollection and expressly declined to ask for additional time to investigate Sheridan's testimony further. Under these circumstances, petitioner's rights to due process were not violated. See *United States* v. *Bagley*, 473 U.S. 667 (1985); *United States* v. *McPartlin*, 595 F.2d 1321, 1345-1347 (7th Cir.), cert. denied, 444 U.S. 833 (1979).[13]

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[11] Trial Exhibit H-1 was a telephone message taken by petitioner's secretary on June 14, 1982, indicating that Sheridan would call petitioner at home that evening. Because Sheridan rarely called petitioner at home, and because the message was taken on the Monday following the annual Ocean City convention, the notation triggered Sheridan's recollection that the purpose of the call was to report on Pollino's meeting with Harford at the convention.

[12] The district court asked the defendants if they wanted a continuance or a mistrial based on their claimed "surprise" at the change in Sheridan's recollection. The defendants made no such request. C.A. App. 1144, 1191, 3240. Having refused that opportunity, petitioner cannot now complain that he lacked sufficient time to investigate the circumstances of Sheridan's changed testimony or to prepare a defense. Pet. 22-23.

[13] Even if the evidence about Sheridan's change in testimony had

With respect to Pollino's alleged change of recollection, the defendants never made a *Brady* argument in the district court and were therefore foreclosed from raising the argument for the first time on appeal. In any event, petitioner knew before trial that Pollino had initially failed to disclose to the government his meeting with Harford in Ocean City and had initially told the government only about meetings that occurred in 1983.[14] In a letter delivered to defense counsel four months before trial, the government disclosed that, while Pollino had initially denied any price-fixing activities relating to the Baltimore area (a region covered by the conspiracy in this case), in mid-1987, Pollino "indicated that he had participated in price-fixing activities involving

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not been disclosed at trial, there could have been no prejudice to petitioner. The date of the Ocean City meeting and Sheridan's credibility with respect to that date would not have affected the substantial independent evidence of the price-fixing conspiracy and petitioner's involvement in it.

[14] Pollino testified at the related trial of Pepsi's Richmond division manager, Armand Gravely, who was convicted of price-fixing in the Richmond area. *United States* v. *Gravely*, 840 F.2d 1156 (4th Cir. 1988) (see Pet. App. 3a). The indictment in the *Gravely* case was limited to events beginning in 1983 in the Richmond-Norfolk area because Pollino had not yet disclosed to the government the fact that the conspiracy extended to Baltimore and began with the Ocean City meeting in 1982. In this case, the indictment covered Baltimore and events in 1982 because of information learned after the *Gravely* indictment was filed. Petitioner is flatly wrong in claiming, without citation (Pet. 19 (emphasis added)) that "shortly before the indictment in this case was issued, the prosecution was preparing indictments based upon a conspiracy beginning in *1983*." The government knew that Sheridan's recollection was probably faulty when he placed the Ocean City meeting in 1983, because other evidence (admitted at the *Gravely* trial) showed that price-fixing activities occurred in early 1983 and that Pollino placed the Ocean City meeting in 1982.

the Baltimore Division of Allegheny Pepsi; that in 1982 he met with [petitioner] and James P. Sheridan concerning price fixing; that he participated in a price-fixing meeting with James J. Harford in Ocean City, Maryland, in June 1982."[15] Thus, although Pollino had originally failed to disclose his meeting with Harford in 1982, the government revealed Pollino's change in his story well before trial.

Although Pollino consistently stated before and during trial that the Ocean City meeting occurred in 1982 (C.A. App. 2519, 2872), he indicated on cross-examination that he had initially told the government that the Ocean City meeting had occurred in 1983 rather than 1982. C.A. App. 2883.[16] That answer (from a witness the court had termed "recalcitrant" because of his connections to the defense, C.A. App. 2606, 2825) came as a surprise to the government. The defendants, however, never claimed that they were surprised by Pollino's testimony, and they never asked for a continuance to investigate the alleged change in his recollection. Instead, they effectively cross-examined him concerning the matter. Thus, as in the case of Sheridan's change of recollection, the government did not withhold any exculpatory evidence from the defendants at trial.

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[15] Pollino testified at trial that initially he had not wanted to implicate Harford in the conspiracy and that he was just telling the government what they already knew. When he realized that the government was going to get the information from other sources anyway, he decided to tell all he knew. C.A. App. 2876-2880.

[16] Defense counsel tried to show that the reason Pollino changed the year of the meeting was because the government showed him some of Harford's expense reports, which defendants claimed showed that Harford could not have been in Ocean City in June 1983. C.A. App. 2883-2884. Pollino denied that these documents caused him to change his testimony (just as James Sheridan had, see note 11, *supra*). C.A. App. 2884.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General
JUDY L. WHALLEY
Acting Assistant Attorney General
JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

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No. 88-1988

In The

Supreme Court of the United States

October Term 1989

MORTON M. LAPIDES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean, Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007
(202) 342-5200
Of Counsel

Alan Dershowitz, Esquire
and
Elizabeth A. Boggs, Esquire
Of Counsel
232 Brattle Street
Cambridge, MA 02138
(617) 495-3100

DATED: July 28, 1989

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

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INTRODUCTION

Petitioner hereby submits this reply brief to address matters raised in the government's Brief in Opposition.

ARGUMENT

I. PETITIONER DID NOT RECEIVE THE INDEPENDENT APPELLATE REVIEW EVEN THE GOVERNMENT CONCEDES HE WAS DUE.

In its opposition brief, the government contends that the unpublished *per curiam* opinion below satisfies Petitioner's right to an independent review of his conviction by the Court of Appeals. (Govt. Brief at 4.) Even a cursory review of the record makes clear, however, that the Court of Appeals did not conduct an independent review of Petitioner's conviction.[1] Indeed, the

[1] The Court of Appeals apparently relied on a conclusory, inaccurate description of the evidence in the trial court's opinion.

linchpin of the Court of Appeals decision was its erroneous belief that the testimony of Jerry Pollino supported, rather than flatly contradicted, the testimony of the only witness against Petitioner — James Sheridan. Mistakenly convinced that the case against Petitioner was overwhelming, the Court of Appeals apparently believed it unnecessary to give serious consideration to the issues raised by Petitioner.

The government's brief attempts to buttress the Court of Appeals opinion by twisting the testimony of Pollino to fit the Court of Appeals' erroneous recitation of the evidence. The government's rendition of Pollino's testimony is simply not supported by the record.

(1) The government contends that Sheridan and Pollino "both implicated Petitioner in the price fixing conspiracy." (Govt. Brief at 6.) The government supplies no citation for this assertion and none exists in the record.

(2) The government asserts that "Sheridan and Pollino, who were subordinates of Petitioner, testified that Petitioner knew in 1982 that Pollino was going to meet with Coke's president, James Harford, at an upcoming Ocean City convention to discuss pricing." (Govt. Brief at 6.) This bald assertion is contradicted by the record. Pollino merely testified that Petitioner had been informed that Pollino would be seeing Harford at a Maryland Soft Drink Association convention — hardly a surprising or suspicious occurrence at a convention whose purpose was to bring together members of the industry to discuss legitimate concerns. On direct examination by the government, Pollino specifically denied that the possibility of discussing prices with Harford was mentioned to Petitioner. (C. A. App. at 2528[2].) Indeed, Pollino did not even testify that Petitioner assented to the meeting with Harford. (C. A. App. at 2532.)

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[2] Q. Did you discuss what the reasons were for the meeting in Ocean City at the convention?

A. No. The whole meeting probably took a minute, a minute and a half max. It was very quick. Very brief. And back out and have lunch.

(3) The government also asserts that "Pollino as well as Sheridan testified that Petitioner knowingly endorsed it [the conspiracy]." (Govt. Brief at 7, n.7.) Again, the record is clearly to the contrary; the very page cited by the government refutes its assertion. (C. A. App. at 2532[3].)

(4) The government further contends that "Pollino did not contradict Sheridan's testimony" regarding reports to Petitioner about the conspiracy. However, Sheridan claimed these alleged reports were made pursuant to a directive given by Petitioner at the critical 1982 meeting attended by Sheridan, Pollino and petitioner. Pollino flatly denies such a directive was given. *See* Cert. Pet. at 12, n. 6.

The Court of Appeals' failure to independently review the fundamental facts underlying Petitioner's appeal deprived Petitioner of his right to a meaningful appeal. Nonetheless, the government argues that this Court should not consider issues relating to the sufficiency of the evidence on a petition for certiorari. (Govt. Brief at 6.) The government's argument is disingenuous, particularly in light of its earlier suggestion that a petition for certiorari to this Court is the appropriate mechanism to ensure the Courts of Appeals' accountability in cases disposed of by unpublished or summary opinions. (Govt. Brief at 5.)

This Court should grant certiorari in order to determine whether the Court of Appeals has provided a meaningful review of Petitioner's contentions and to consider the limitations of the right of appeal resulting from the increasing use of unpublished dispositions of appeals.

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[3] Q. Did Mr. Lapides [Petitioner] indicate his assent that you should meet with Mr. Harford?

A. No, sir.

II. THE COURT OF APPEALS FAILED TO ADDRESS THE PREJUDICE TO PETITIONER RESULTING FROM THE GOVERNMENT'S USE OF AN UNCHARGED THEORY OF VICARIOUS LIABILITY.

A. The Government Did Argue Its Vicarious Liability Theory To The Jury.

The government apparently now seeks to deny that it argued its vicarious liability theory. (Govt. Brief at 9.)[4] Once again, the record belies the government's position. The government argued:

> In addition, as Chairman of the Board, and the controlling owner of the company, he [Petitioner] joined the conspiracy and was responsible for it by encouraging his subordinate employees, by authorizing their conduct, by condoning what was going on, and *by failing to take any action to stop the price fixing when he clearly had the power to do so.*
>
> * * *
>
> ...Like Lapides [Petitioner], Harford joined in and was responsible for the conspiracy *by his failure to put a stop to the activities of his subordinates, that he knew the price fixing activities were going on.*

(Emphasis added.) [C. A. App. at 7556-7.]

There could have been no purpose for the government's emphasis on Petitioner's failure to stop the price fixing conspiracy except to assure the jury that Petitioner could be convicted on that basis. The fact that the vicarious liability theory was included in an otherwise proper argument does not lessen the prejudice to Petitioner nor immunize the improper argument from scrutiny. The jury was quite clearly urged by the government to convict

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[4] Although the government now seeks to characterize Pollino's testimony as favorable to its case, the government was clearly aware at trial of the weakness of its case resulting from the fundamental contradictions between Sheridan and Pollino. In order to bolster its case, the government sought to persuade the jury during argument that Petitioner could be convicted if he knew about the conspiracy and failed to put a stop to it. This theory of vicarious liability was not set forth in the indictment and is not a proper basis for conviction under the Sherman Act.

Petitioner if they believed he merely knew about the conspiracy and failed to stop it.[5]

B. The Trial Court's Instructions Did Not Cure The Prejudicial Effects Of The Government's Improper Argument.

The government also contends that, even if its argument to the jury was improper, its conduct could not supply a basis for reversal because the trial court properly instructed the jury that the court's charge, and not arguments of counsel, must govern deliberations. (Govt. Brief at 9-10.) However, the mere reading of this standard instruction, particularly without reference to the specific misstatements of law made by the government, does not immunize improper argument.

A reviewing court "may consider the prejudicial statements themselves, the efficacy of any cautionary instructions given by the district court, and the strength of the admissible evidence of guilt," in determining whether improper argument requires reversal. *United States v. Hutson*, 821 F.2d 1015, 1021 (5th Cir. 1987), *citing United States v. Livingston*, 816 F.2d 184, 195 (5th Cir. 1987). The government's misstatement of the acts required to support conviction was obviously prejudicial to Petitioner. Indeed, the government argued a theory of liability that required no acts of participation whatsoever.[6]

[5] In arguing its vicarious liability theory, the government clearly misstated applicable law. *See United States v. Panzanella*, 416 F.Supp. 68, 72 (W.D. Pa. 1976) (failure to prevent conspiracy despite power to do so does not prove guilt absent evidence of affirmative participation in the conspiracy). Moreover, the government's arguments were made despite the trial court's refusal to give the government's requested instruction on its vicarious liability theory. A prosecutor may not misstate the law in closing argument. *See United States v. Artus*, 591 F.2d 526, 528 (9th Cir. 1979) (conviction reversed); *United States v. Segna*, 555 F.2d 226, 231 (9th Cir. 1977) (new trial granted based on closing arguments); *United States v. Narciso*, 446 F.Supp. 252 (E.D. Mich. 1977) (new trial granted based in part on prosecutor's misstatement of law during closing).

[6] Given the prejudicial effect a misstatement of the law may have on the jury at a critical time in the trial, counsel should take great care to avoid misstating the law during closing argument and, if in doubt, seek a ruling on the point before going forward with the argument. *See United States v. Sawyer*, 443 F.2d 712, 714 n.11 (D.C. Cir. 1971). Here, the government was aware the trial court had refused to instruct the jury on this theory, but nonetheless presented it to the jury.

III. THE TRIAL COURT DID NOT ADVISE THE JURY THAT IT COULD DISREGARD THE COURT'S COMMENTS REGARDING SHERIDAN'S CREDIBILITY.

The prejudice and unfairness arising from the trial court's comments bolstering the credibility of Sheridan is discussed in Petitioner's Petition for Certiorari. (Cert. Pet. at 12-14.) However, in its Brief in Opposition, the government implies that the trial court cured any prejudice resulting from its remarks by advising the jury that its comments could be disregarded. The record is to the contrary. The trial court did not clearly distinguish its personal remarks regarding Sheridan from the remaining binding instructions during its charge. Moreover, the trial court did not advise the jury that it could disregard the court's remarks regarding the credibility of Sheridan.

Indeed, the cautionary language cited in the government's brief did not relate to the trial court's comments regarding Sheridan's credibility, but instead introduced the trial court's comments regarding the difficulty the government faced in finding witnesses in a conspiracy case:

> You should receive the testimony of an alleged co-conspirator, or an immunized witness, with great caution and weigh it carefully. The fact that a witness may have participated in the crime charged in the indictment or that he may have violated the law or pled guilty does not mean that he has not told the truth, but it is a factor to utilize in considering and weighing the testimony of that person.
>
> I emphasize that certain witnesses were not on trial here. Mr. Sheridan was not on trial in this case.
>
> In relation to witnesses — and this is my comment — and I emphasize it's my comment, on the factor of witnesses, and it is only a comment. You may disregard this comment entirely.
>
> The government must take the witnesses where they find them.

> Obviously, the witnesses who know the most about any alleged price fixing are those who were employed and were hired by one or the other of the competing competitors.
>
> Insofar as the — they may testify — these witnesses of necessity must be employees of either one of these two companies.
>
> So the government must take them where they find them. If no one, if no one were to come forward, there is very little opportunity for the government to find out what did or did not happen. Obviously, therefore, either someone must come forward or the government must utilize some means of requiring the people to testify.
>
> I emphasize this as my comment because otherwise sometimes one doesn't understand about the necessity of this immunity situation.

(C. A. App. at 7936-7.)

Review of the pertinent portion of the trial court's instructions makes clear that the trial court's remarks regarding Sheridan's credibility were never identified as anything other than an instruction binding on the jury. The excerpts of the trial court's cautionary language cited in the government's brief related to the trial court's above-quoted comments regarding the government's need to use immunized witnesses.

IV. THE GOVERNMENT DOES NOT EXPLAIN WHY IT DELIBERATELY CHOSE TO WITHHOLD *BRADY* MATERIAL FROM PETITIONER UNTIL TRIAL.

The government readily admits that it learned of Sheridan's change in testimony regarding the crucial Ocean City meeting well before trial, but failed to disclose that information to Petitioner until the trial was underway. The government does not explain, however, why it failed to disclose Sheridan's change in

testimony to Petitioner until trial. Instead, the government argues that Petitioner was not prejudiced.[7]

The government clearly sought and obtained tactical advantage by suppressing Sheridan's change in testimony until the trial. First, the government prevented Petitioner from undertaking the time-consuming investigation of the circumstances surrounding Sheridan's change in testimony. Second, the government's concealment of Sheridan's change in testimony misled Petitioner as to the testimony he would be required to defend against at trial, causing him to waste time and resources preparing for testimony the government knew would not arise.

The government clearly believed it would benefit from the concealment of Sheridan's change in testimony until trial. In fact, the government apparently felt the benefits of keeping Petitioner in the dark were worth the risk of ignoring its obligations under *Brady* and violating the trial court's order to produce materials required by *Giglio v. United States*, 405 U.S. 150 (1972), 21 days before trial. (C. A. App. at 8604.) Having obtained those benefits, it cannot now credibly argue to this Court that Petitioner has suffered no prejudice.

With respect to Pollino's change in testimony regarding the critical Ocean City meeting, the government apparently claims that Pollino lied on the stand when he testified that he had initially told the government that the Ocean City meeting occurred in 1983. *See* Govt. Brief at 13. Incredibly, the government implies that Pollino was somehow a witness friendly to the defense. Such a suggestion about one of the government's two principal witnesses — a witness who testified for the government under a grant of immunity — is ludicrous.[8] Since the government has continued to

[7] The government apparently does not contend that Sheridan's change in testimony did not come under its obligations pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, the government's suppression of Sheridan's change in testimony was clearly not an oversight. Prior to trial, the government made two supplemental *Brady* disclosures on other matters, the last such disclosure coming after Sheridan purportedly changed his testimony.

[8] Indeed, government attorneys met with Pollino at least seven times to prepare Pollino for trial, including some sessions which lasted up to two days. (C. A. App. at 2807.) Only one defense attorney met with Pollino on one occasion for

jealously guard its interview notes regarding Pollino, Petitioner cannot know for sure whether the government was truly surprised. However, it is significant that the government has apparently never taken any action against Pollino for perjury.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that this Court grant a writ of certiorari.

Robert H. Morse, Esquire
David K. Monroe, Esquire
Peter J. Petesch, Esquire
Michael T. Dean, Esquire
GALLAND, KHARASCH,
MORSE & GARFINKLE, P.C.
1054 Thirty-First Street, NW
Washington, DC 20007
(202) 342-5200
Of Counsel

Alan Dershowitz, Esquire
and
Elizabeth A. Boggs, Esquire
Of Counsel
232 Brattle Street
Cambridge, MA 02138
(617) 495-3100

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approximately one hour, seven months before trial. (C. A. App. at 2806.) That occasion was the last time any defense counsel was permitted to see Pollino.